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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1228. [redacted] 192

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, APPELLANT,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED DECEMBER 6, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1238.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, APPELLANT,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

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INDEX.

	Original.	Print.
Caption	1	1
Intervening petition of St. L., A. & T. H. R. R. Co.	2	1
Exhibit B—First guarantee contract, May 17, 1867	10	10
A—Lease or operating contract, Sept. 11, 1867	11	11
C—Second guarantee contract, Sept. 11, 1867	23	24
E—Agreement between C., C., C., & I. R. R. Co. & P., Ft. W., & C. R'y Co., May 1, 1869	26	27
D—Account of I. & St. L. R. R. Co. with St. L., A. & T. H. R. R. Co.	30	33
Answer of C., C., C., & I. R'y Co.	31	34
John H. Devereux	35	39
Penn. R. R. Co.	38	41
Evidence for petitioner	41½	45
Statement of acting auditor I. & St. L. R. R. Co., June 2, 1883	41½	46
Testimony of Henry T. Nash	43	49
Exhibit A—Statement of gross earnings and operating expenses of I. & St. L. R. R., from 1870 to May 24, 1882	43	50
B—Statement of earnings of Indianapolis division of I. & St. L. R. R. from May 24 to Oct. 1, 1882	44	50

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Exhibit C—Statement of the issues of bonds I. & St. L. R. R., and discounts on same	44	51
D—Statement of interest paid on I. & St L. R. R. bonds from 1870 to Oct. 1, 1882	45	52
E—Statement of cost of road and equipment of I. & St. L. R. R. from Indianapolis to Terre Haute, to May 23, 1882	46	53
F—Statement of sinking fund account of I. & St. L. R. R. from 1870 to May 24, 1882	46	53
G—Statement of interest on I. & St. L. R. R. Co. bonds paid by J. H. Devereux, rec'r, from May 24, 1882, to Oct. 1, 1882	47	54
H—Statement of earnings and operating expenses of St. Louis leased division of I. & St. L. R. R. from May 24, 1882, to Oct. 1, 1882	47	54
J—Lease between St. L., A. & T. H. R. R. Co. & I. & St. L. R. R. Co., Feb. 23, 1883	48	55
K—Statement of earnings and operating expenses I. & St. L. R. R., St. Louis division, from 1867 to 1882	54	65
L—Statement of gross earnings of the St. Louis "leased" division of the I. & St. L. R. R. for the months of July, August, and September, 1882	55	66
M—Statement of payments made by J. H. Devereux, rec'r of Ind. & St. L. R. R. Co. on account of rents accrued	55	66
Testimony of Geo. W. Parker	55	67
Statement of liabilities of the I. & St. L. R. R. Co., Sept. 30, 1882	59	71
Statement of receipts by rec'r I. & St. L. R. R. Co. prior to May 24, 1882	60	72
Stipulation as to evidence	61	73
Evidence for respondents	63	74
Testimony of P. A. Hewitt	63	74
Exhibit O—Statement of earnings and expenses of St. L., A. & T. H. R. R. from Nov. 24, 1881, to May 23, 1882, inclusive	63	74
P—Statements of disbursements by J. H. Devereux, rec'r, on account of indebtedness of I. & St. L. R. R. Co.	64	75
Q—Statement of earnings, expenses, etc., of the St. L., A. & T. H. R. R. for 1867 to 1882	65	76
R—Statement of earnings, expenses, etc., of the I. & St. L. R. R. Co. (both divisions)	65	77
S—Statement of earnings, expenses, etc., of the I. & St. L. R. R. Co. (both divisions)	66	78
T—Statement of earnings, expenses, etc., of St. L., A. & T. H. R. R. for 1878 to 1882	66	78
Analysis of freight and passenger earnings of I. & St. L. R. R. for 1871 to 1881, inclusive	72	85
Decree	77	92
Stipulation as to record on appeal	79	93
Bond	82	94
Clerk's certificate	84	95

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and eighty-four, before the Honorable Thomas Drummond, judge of said circuit court, and the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana, and *ex officio* judge of said circuit court.

HINMAN B. HURLBUT, Trustee, &c.,
vs.
THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY. } 7418. Chancery.

In the Matter of the Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company.

Be it remembered that heretofore, to wit, at the May term of said, court, on the 30th day of October, A. D. 1882, in recess of said court, the following proceedings in the above-entitled cause were had, to wit:

2 By leave of the court first had and obtained comes now the St. Louis, Alton and Terre Haute Railroad Company, by its solicitors, on this 30th day of October, A. D. 1882, and files its intervening petition in the above-entitled suit, in the words following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Indiana, in chancery sitting:

The petition of the St. Louis, Alton & Terre Haute Railroad Company, a body politic and corporate, duly organized and existing under and by virtue of the laws of the State of Illinois, by McDonald and Butler and Wiley and Neal, its solicitors, by leave of the court first had and obtained by this, its intervening petition, respectfully shows to your honors that this is an action for the foreclosure of the second and third mortgages upon the real estate, property, and franchises of the defendant, The Indianapolis and St. Louis Railroad Company, that a decree of foreclosure and sale of said property was entered on the 22d day of May, 1882, and that in pursuance of said decree the property of said railroad company was sold on the 28th day of July, 1882, for the sum of $1,396,000, and is now, by purchase, the property of the Indianapolis and St. Louis Railway Company.

Your petitioner further shows that by the terms of said decree the court reserves to itself the right, by subsequent order or orders, to distribute the proceeds of the sale of said railroad and property, and to make such further order and decree in regard to the distribution of the proceeds of the sale as may to the court seem just and equitable; and by said decree it was further ordered that William P. Fishback be appointed a master commissioner for the purpose, among other things, of hearing evidence in support of all claims of indebtedness in behalf of any creditors, secured or not, of said de-

fendant company, and to make report of his findings, together with the evidence in support of each claim; and to take such further proceedings for the ascertainment of the amount of indebtedness, and the ownership of all claims and indebtedness against the said Indianapolis & St. Louis Railroad Company, as the court should direct.

Your petitioner further shows that on, to wit, the 11th day of September, 1867, an agreement was entered into between petitioner and the defendant, The Indianapolis & St. Louis Railroad Company; by the terms whereof it was provided that the said Indianapolis & St. Louis Railroad Company should manage, operate, and carry on the business of that portion of petitioner's road, known as its
3 principal or main line, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, a distance of one hundred and eighty-nine miles, and of the Alton branch thereof, extending from Alton Junction, in the State of Illinois, to Alton, in said State, a distance of four miles, for the period of ninety-nine years from the first day of June, 1867; that said Indianapolis & St. Louis Railroad Company should in each and every year of the said term of ninety-nine years pay, or cause to be paid, to petitioner thirty per cent. of the gross earnings of the said main line and Alton branch until such gross earnings for such year should amount to two million dollars, and twenty-five per cent. of any excess over two million dollars, until the whole earnings for such year should amount to three million dollars, and twenty per cent. of any excess over three million dollars of gross earnings for such year; and it was agreed that such percentage should be paid over without any deduction, abatement, or diminution for any cause whatever; and it was further provided and agreed that the said payments should amount in each and every year to at least the sum of four hundred and fifty thousand dollars, which amount was agreed upon as a minimum rental, and was to be paid absolutely, without reference to the percentage which it formed of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year. And that said Indianapolis & St. Louis Railroad Company should be entitled to retain out of the earnings of the road of the petitioner only seventy per cent of the gross earnings of petitioner's road so operated by it; and that the thirty per cent. should at all times be the property of petitioner, as will more fully appear by said operating contract, a copy of which is hereto annexed, marked "Exhibit A," and prayed to be taken and read as part of this petition.

And petitioner further shows that on or about the 17th day of May, 1867, the Indianapolis, Cincinnati & La Fayette Railway Company, party of the first part; the Pittsburgh, Fort Wayne and Chicago Railway Company, party of the second part; the Pennsylvania Railroad Company, party of the third part; the Bellefontaine Railroad Company, the Cleveland, Columbus and Cincinnati Railroad Company, and the Cleveland, Painesville and Ashtabula Railroad Company, forming jointly the party of the fourth part (said party of the fourth part, by various consolidations, now constituting the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company,

and the Lake Shore and Michigan Southern Railway Company, and your petitioner as party of the fifth part), entered into and executed a certain agreement of guaranty, whereby the parties of the first, second, third, and fourth parts, for good and valuable consideration, did agree and guarantee to and with said petitioner that the Terre Haute and Indianapolis Railroad Company, a solvent corporation, owning the then only line of railroad between Terre Haute and Indianapolis, should on or before the first day of July, 1867, become the lessee of petitioner's road upon the terms and conditions of said contract, "Exhibit A," and that in case of the failure of said company so to become said lessee some other responsible corporation owning a road from Indianapolis to Terre Haute should become such lessee, said contract being entered into on the part of said parties of the first, second, third, and fourth parts for the purpose of securing for themselves a direct line of railroad communication with the Mississippi river at St. Louis, in connection with their re-
4 spective lines of railroad, a copy of which agreement is hereto attached, and marked "Exhibit B," and which your petitioner prays leave to refer to with like effect as if here set out at length; that your petitioner's said road was turned over to said parties of the first, second, third, and fourth parts, as of the 1st day of June, 1867, upon the faith of said contract, "Exhibit B," and the income of petitioner's said line of road was thenceforward received and enjoyed by said parties of the first, second, third, and fourth parts until the execution of said contract, "Exhibit A," and afterwards in accordance therewith, and for the purpose of carrying out said contract "Exhibit B," said contract "Exhibit A" was executed, as hereinbefore set forth.

Petitioner further shows that on said 11th of September, 1867, the Indianapolis, Cincinnati and La Fayette Railway Company, party of the first part; the Pittsburg, Fort Wayne and Chicago Railway Company, party of the second part; the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Lake Shore Railroad Company, now merged by consolidation in the Lake Shore and Michigan Southern Railway Company, jointly, party of the third part, and petitioner, party of the fourth part, entered into and executed a certain agreement, called an agreement of guaranty, whereby said parties of the first, second, and third parts, covenanted and agreed with the said party of the fourth part that said Indianapolis and St. Louis Railroad Company should and would faithfully perform all the conditions and obligations assumed by it by said operating contract hereinbefore referred to as "Exhibit A," as will more fully appear by said agreement of guaranty, a copy of which is filed herewith, marked "Exhibit C," and prayed to be taken and read as part of the petition.

Petitioner further shows that under and by virtue of the terms of said operating contract, it became and was the duty of said Indianapolis and St. Louis Railroad Company to operate the said road of petitioner and pay the rental reserved as aforesaid, and that such rental for the use and occupation of said continuous line constituted a part of the operating expenses of said Indianapolis and St. Louis

Railroad Company; that said operating contract was executed before any of the bonds of said Indianapolis and St. Louis Railroad Company were issued and sold; that it was the duty of said Indianapolis and St. Louis Railroad Company to pay all its operating expenses, including the said rental of said petitioner's road, out of its earnings before it paid any interest upon its said bonds; that said Indianapolis and St. Louis Railroad Company, instead of paying its operating expenses, diverted and appropriated its earnings to improvements of its property, in better equipment and new construction, and the payment of interest upon its bonds, and neglected and refused to pay petitioner's rental, which now amounts to the sum of six hundred and sixty-four thousand eight hundred and seventy-four dollars and seventy cents, as will more fully appear by schedule showing rental due each month, and payments thereon, which is filed herewith, marked "Exhibit D," and made a part of this petition, and which, with interest added, aggregated the sum aforesaid.

Petitioner further states, upon information and belief, that during the time said defendant, The Indianapolis and St. Louis Railroad Company, has been in the possession of petitioner's road as aforesaid, the amount of such misappropriation and diversion of the funds that should have been applied to the payment of operating expenses amounts to a large sum, to wit, the sum of one million dollars.

5 Petitioner further shows that at the time of the execution of the said operating contract the said Indianapolis and St. Louis railroad was not built, and said Indianapolis and St. Louis Railroad Company was organized and created by said guarantors for the express purpose of furnishing them a through line to the Mississippi river; that while by the letter of the contract the Indianapolis and St. Louis Railroad Company was the lessee of petitioner's road, yet, in fact, it was leased and operated for the benefit of said guarantors; that the money to build said Indianapolis and St. Louis railroad was furnished by the said Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company, and the Pittsburg, Fort Wayne and Chicago Railway Company in equal portions, the said Indianapolis, Cincinnati and La Fayette Railway Company having become insolvent before said Indianapolis and St. Louis railroad was constructed; that after the failure of said Indianapolis, Cincinnati and La Fayette Railway Company to take any part in the construction of said Indianapolis and St. Louis railroad, the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and the Pittsburg, Fort Wayne and Chicago Railway Company, so constructing said road as aforesaid, entered into contract between themselves, for the management and operation of the said continuous line of railroad, from Indianapolis, in the State of Indiana, to East St. Louis, in the State of Illinois, that is, including the said Indianapolis and St. Louis railroad and the said road of petitioner, by the terms whereof they were to send all their business over said last named road.

Petitioner further shows that after the execution of said guaranty contract, on, to wit, the 27th day of June, 1869, the Pennsylvania

Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, leased the railroad of said Pittsburg, Fort Wayne and Chicago Railway Company, and by the terms of said lease assumed all the obligations of said Pittsburg, Fort Wayne and Chicago Railway Company, and particularly its obligation to petitioner, under said guaranty contract, "Exhibit C;" that the said Pennsylvania Railroad Company, or the Pennsylvania Company, another corporation chartered by the State of Pennsylvania, all of whose stock and bonds are held and owned by said Pennsylvania Railroad Company, now hold five thousand eight hundred and sixty shares of the capital stock of the said Indianapolis and St. Louis Railroad Company, and the said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company hold and own five thousand nine hundred and fifty shares of said stock, said two companies owning the entire amount of said capital stock, except one hundred and ninety shares, which, in small amounts of twenty shares and under, is held by individuals connected with and in the interest of said companies, to qualify them to act as directors and officers of said Indianapolis and St. Louis Railroad Company; that said Pennsylvania Railroad Company or said Pennsylvania Company, also holds four hundred and forty thousand dollars of first mortgage bonds of said Indianapolis and St. Louis Railroad Company, and said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company holds, and since the execution of said second mortgage has continuously held, five hundred thousand dollars of the second mortgage bonds of said Indianapolis and St. Louis Railroad Company, and, as petitioner is informed and believes, now holds substantially all of said second mortgage bonds; that said Indianapolis and St. Louis Rail-
6 road Company, prior and up to the time of its foreclosure and sale, was controlled by six directors, half of whom were officers of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and half were officers of the Pennsylvania Railroad Company, or of the Pittsburg, Cincinnati and St. Louis Railroad Company, a corporation owned and controlled by the said Pennsylvania Railroad Company.

Petitioner further shows that its railroad is a connecting road with that of the said Indianapolis and St. Louis Railroad Company, its eastern terminus being the western terminus of the said Indianapolis and St. Louis railroad, and thus forming a continuous line from Indianapolis to East St. Louis, on the Mississippi river; and said road of petitioner is the only outlet for said Indianapolis and St. Louis railroad, west of Terre Haute; that a very large proportion of the earnings of said Indianapolis and St. Louis Railroad Company are derived from business received by it from said leased line of petitioner's, and that the earnings of said leased road, over and above the amount authorized to be retained by said Indianapolis and St. Louis Railroad Company, for the purpose of operating the same, at all times have been, and now are, the property of petitioner, and the same have been diverted and misapplied by said Indianapolis and St. Louis Railroad Company, in the payment of

interest and otherwise, misapplied to its own use and that of the guarantor companies.

Petitioner further shows that it is informed and believes that said Cleveland, Columbus, Cincinnati, and Indianapolis Railway Company, the Pennsylvania Railroad Company, and the Pittsburg, Fort Wayne, and Chicago Railway Company each claim that said Indianapolis and St. Louis Railroad Company is indebted to them generally in large amounts, and are each claiming that such indebtedness has priority in equity to the claim of the bondholders, and that in the distribution of the proceeds of sale they should be preferred to the said bondholders of said Indianapolis and St. Louis Railroad Company.

Petitioner further shows that whatever claims said companies may have against said Indianapolis and St. Louis Railroad Company, they are inferior to the right of petitioner, to be paid for the use of its said road by said Indianapolis and St. Louis Railroad Company, in compliance with the terms of said operating contract, "Exhibit A."

Petitioner further shows that since the appointment of J. H. Devereaux, as receiver of said Indianapolis and St. Louis railroad, he, the said Devereaux, as such receiver, has been in the possession of petitioner's said leased road, and has operated the same, receiving all the earnings of such road, and having so operated said road of petitioners, was, in law and equity, bound to pay to petitioner the rent for the same reserved in and by said operating contract; that during part of that time thirty per cent. of the gross earnings has been less than the minimum rent reserved by said operating contract, and that said receiver has paid only thirty per cent. of the gross earnings of petitioner's road, and is therefore indebted to petitioner for the difference between thirty per cent. so paid and the minimum rental of thirty-seven thousand five hundred dollars per month reserved by said operating contract.

Petitioner further shows that on the 1st day of May, 1878, the said defendant, the Indianapolis and St. Louis Railroad Company, made default in the payment to petitioner of the rental then due it, under the terms of said operating contract, and so continued to make
7 default, from and including 1st day of April, 1878, up to and including the 26th day of October, 1878, during which time it was in the possession and use of petitioner's road, and receiving the profits and income thereof, and absolutely neglected and refused to pay to petitioner the thirty per cent. of the gross earnings of petitioner's road, or any part thereof, during all of said time, but wrongfully appropriated to its own use the entire gross earnings of petitioner's said road; which said thirty per cent. during said time amounted to the sum of one hundred and sixty-four thousand and fifty-two dollars and eighty-two cents, and said Indianapolis and St. Louis Railroad Company appropriated said money to improvements, betterments and new construction upon its own line of railroad, and in the purchase of rolling stock and equipment, and in the payment of interest upon its bonds, and otherwise appropriated the whole of

said trust fund, the property of petitioner, to the benefit of its security holders.

Petitioner further shows that on, to wit, the 25th day of October, 1878, it filed its bill of complaint in this honorable court, for the purpose of obtaining relief against said Indianapolis and St. Louis Railroad Company, and other defendants therein named, being said guarantors of said operating contract, and on, to wit, the 26th day of July, 1882, a decree was entered in said cause, wherein it was adjudged and decreed that said operating contract, "Exhibit A," was a valid and binding contract; that said guaranty contract, "Exhibit C," was a valid and binding contract; that the liability of each party to said guaranty contract was several and not joint; that each was bound for the one-third part of any damages arising by virtue of the default of the Indianapolis and St. Louis Railroad Company, and found that the Indianapolis and St. Louis Railroad Company had made default in the payment of its rental, and was indebted to petitioner, on account of such rental, in the sum of six hundred and sixty-four thousand eight hundred and seventy-four dollars and seventy cents, being principal up to July 1st, 1882, and interest to July 26th, 1882, and ordered and decreed that said Indianapolis and St. Louis Railroad Company pay to petitioner, within sixty days from July 26th, 1882, said sum of six hundred and sixty-four thousand eight hundred and seventy-four dollars and seventy cents, and costs, and that in default of such payment within said sixty days, that said Pittsburg, Ft. Wayne, and Chicago Railway Company and the said Pennsylvania Railroad Company pay one-third of whatever part of said sum remained unpaid at the expiration of said sixty days, and that the Cleveland, Columbus, Cincinnati, and Indianapolis Railway Company and the Lake Shore and Michigan Southern Railroad Company pay one-third of whatever part of said sum remains unpaid at the expiration of said sixty days; and that the Pennsylvania Railroad Company, the Pennsylvania Company, the Pittsburg, Ft. Wayne, and Chicago Railway Company, the Lake Shore and Michigan Southern Railroad Company, and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company be restrained and enjoined from collecting any dividends on any stock, or any interest or principal on any bonds of the Indianapolis and St. Louis Railroad Company, held by them or either of them, until they had paid the said sums so decreed to be paid by them respectively, all which will more fully appear by said decree, now of record in this court, to which reference is here made.

Petitioner further shows that upon the defendant's, the Indianapolis and St. Louis Railroad Company, taking possession
8 of the road of petitioner in 1867, it received from petitioner supplies of the value of ninety-one thousand eight hundred and sixty dollars and five cents, which by the terms of said lease said lessee contracted and agreed to return or account for to your petitioner at the termination of said lease; that said supplies have long since been consumed by said lessee; that by the terms of the decree and sale herein, said lease has been assigned and transferred to the Indianapolis and St. Louis Railway Company; that under

the order of the court herein, requiring the receiver to schedule all indebtedness of the Indianapolis and St. Louis Railroad Company, said receiver scheduled said amount as due your petitioner.

Petitioner further shows that, by the terms of said operating contract, the said Indianapolis and St. Louis Railroad Company covenanted and agreed to pay, or cause to be paid, at all times during the term of said operating contract, any and all taxes, assessments, and imposts of whatever kind, that should be charged, levied, assessed, or imposed upon the road of petitioner so operated by it; that there was assessed upon said road in 1873, as petitioner is informed and believes, taxes to the amount of fifty thousand dollars, a greater proportion of which still remains unpaid, and the collectors of taxes of the various counties in the State of Illinois through which petitioner's leased road passes are threatening to levy upon the property of petitioner for the purpose of collecting such tax, which, by the terms of said operating agreement, should have been paid by said Indianapolis and St. Louis Railroad Company, that said last-named company is insolvent, all of its property having been told at said sale, on July 28th, 1882, and unless the money is retained out of the proceeds of said sale for the payment of said taxes, petitioner is liable to have the same to pay, and to have no means of collecting the same back from said Indianapolis and St. Louis Railroad Company.

Petitioner further shows that the said Indianapolis and St. Louis Railroad Company, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the Lake Shore and Michigan Southern Railroad Company, the Pennsylvania Railroad Company, the Pennsylvania Company, the Pittsburg, Fort Wayne and Chicago Railway Company have not, nor has either of them, paid any part of said sum so ordered and decreed to be paid by them; that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is the owner of five hundred thousand dollars of the second mortgage bonds of said Indianapolis and St. Louis Railroad Company, upon which said foreclosure was had, and has been such owner continuously since the execution of said second mortgage, and is now, as petitioner is informed and believes, the owner of substantially all said second mortgage bonds, and is claiming the right to a large portion of the fund in this court arising from the sale of said Indianapolis and St. Louis railroad.

Your petitioner, therefore, prays that as to said sum of $664,874.70, it may be decreed to have a prior claim upon the fund arising from the sale of said Indianapolis and St. Louis railroad to that of the bondholder, and that upon a distribution of said fund, its said rental to be paid prior to any payments to the bondholders of said Indianapolis and St. Louis Railroad Company, and, also, that it be paid said sum of $91,860.51, if the court shall hold that, by the terms of said operating contract, and by reason of the sale of said road, said sum is now due it for supplies, or if the court shall hold that said

9 Indianapolis and St. Louis Railway Company did not, by virtue of its purchase of said road and lease, become bound to return or account for said property, at the termination of said lease, before any distribution to bondholders.

And the petitioner further prays that the court will order the said Indianapolis and St. Louis Railroad Company, or said master, out of the proceeds of said sale to pay said taxes so assessed as aforesaid, and which by the terms of said operating contract said Indianapolis and St. Louis Railroad Company was obligated to pay.

Petitioner further prays that it may have priority over any claim said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the Pittsburgh, Fort Wayne and Chicago Railway Company, the Pennsylvania Railroad Company, or the Pennsylvania Company may establish against said fund so in court as aforesaid, and that said companies' claims, if any they have, may be postponed to that of petitioner.

And that petitioner may have such other and further relief as to your honors shall seem meet, and it will ever pray, etc.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY.
McDONALD AND BUTLER AND
WILEY AND NEAL,
Solicitors for Petitioner.

STATE OF MISSOURI, *City of St. Louis:*

On this —— day of October, 1882, before me personally appeared Geo. W. Parker, vice-president of said St. Louis, Alton and Terre Haute Railroad Company, and made oath that he has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me, this —— day of October, 1882.

Notice.

The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the Pennsylvania Railroad Company, the Indianapolis and St. Louis Railway Company, J. H. Deveraux, receiver of the Indianapolis and St. Louis Railroad Company, Hinman B. Hurlbut, trustee, and the Indianapolis and St. Louis Railroad Company are each hereby notified that the original petition, of which the foregoing is a true copy, was filed in the circuit court of the United States for the District of Indiana, in the cause of Hinman B. Hurlbut, trustee, *vs.* The Indianapolis and St. Louis Railroad Company, on the —— day of October, 1882, and that on the —— day of ——, 1882, said petitioner will move the court for an order, directing within what time the evidence in support of said petition shall be taken, within what time thereafter the evidence against said petition shall be taken, and within what time thereafter the evidence in rebuttal shall be taken.

WILEY AND NEAL,
McDONALD AND BUTLER,
Solicitors for Petitioner.

10 EXHIBIT "B,"

Being the First Guarantee Contract Referred to in Bill.

This indenture, made this seventeenth day of May, in the year one thousand eight hundred and sixty-seven, between the Indianapolis, Cincinnati and Lafayette Railroad Company, party of the first part; the Pittsburgh, Fort Wayne and Chicago Railway Company, party of the second part; the Pennsylvania Railroad Company, party of the third part; and the Bellefontaine Railway Company, the Cleveland, Columbus and Cincinnati Railroad Company, and the Cleveland, Painesville and Ashtabula Railroad Company, forming jointly the party of the fourth part; and the St. Louis, Alton and Terre Haute Railroad Company, party of the fifth part hereto, witnesseth:

That the said parties of the first, second, third, and fourth parts hereby promise and agree to, and with each other, and to, and with the party of the fifth part, in consideration of execution of the above contract, at their instance, by the said party of the fifth part, and of the mutual undertaking herein contained, and of the things done or to be done by the said party of the fifth part, and of one dollar in hand paid to each of the said parties by the said party of the fifth part, that the said parties of the first, second, third, and fourth part do hereby promise, agree, and guarantee to the said party of the fifth part that the Terre Haute and Indianapolis Railroad Company shall, on or before the first day of July next succeeding the date hereof, duly execute and deliver to the party of the fifth part the aforesaid contract: Provided, That in case of the failure of the said Terre Haute and Indianapolis Railroad Company so to do, any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute or some point on the road of the party of the fifth part, westwardly of Terre Haute, shall be accepted in lieu of the said Terre Haute and Indianapolis Railroad Company: Provided, That if such substitution be made the party of the fifth part shall be fully indemnified for all losses, damage, or temporary dimunition of business which may result therefrom: And provided further, That if the point of connection of such railroad be west of Terre Haute, the party of the fifth part shall be indemnified in respect to the portion of its line but partially used, so that its income from gross earnings under the aforesaid contract shall not be thereby reduced. And do further promise, agree, and guarantee that the said Terre Haute and Indianapolis Railroad Company, or such other corporation as may be substituted therefor, shall at all times hereafter keep, observe, and perform all and singular the covenants, conditions, and provisions of the aforesaid contract:

Provided, nevertheless, That all the obligations of each of the said parties of the first, second, third, and fourth parts, created hereby, shall be several and not joint, and as to each of them, for the equal fourth part of any damages arising from any default of the said Terre Haute and Indianapolis Railroad Company, or the said other corporation, or for any breach by all said parties of this agreement.

In witness whereof, the parties hereto have caused their corporate

seals respectfully to be hereto affixed, and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

ss. THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILROAD COMPANY,
By H. C. LORD, *President.*

Attest: A. WORTH,
Sec. I., C. & L. R. R.

[U. S. int. rev. stamp. Five cents.]

11 PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY,
By G. W. CASS, *President.*

[U. S. int. rev. stamp. Five cents.]

PENNSYLVANIA RAILROAD COMPANY,
By J. EDGAR THOMPSON, *President.*

[U. S. int. rev. stamp. Five cents.]

BELLEFONTAINE RAILWAY COMPANY,
By STITTMAN WITT, *President.*

[U. S. int. rev. stamp. Five cents.]

CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD COMPANY
(Subject to its approval),
By L. M. HUBBY, *President.*

[U. S. int. rev. stamp. Five cents.]

THE CLEVELAND, PAINESVILLE AND ASHTABULA RAILROAD COMPANY
(Subject to its approval),
By A. STONE, JR., *President.*

[U. S. int. rev. stamp. Five cents.]

SAINT LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
By CHARLES BUTLER, *President.*

[U. S. int. rev. stamp. Five cents.]

EXHIBIT "A,"

Being the Lease or Operating Contract Referred to in Bill.

This indenture, made and entered into this eleventh day of September, one thousand eight hundred and sixty-seven, between the Indianapolis and St. Louis Railroad Company (a corporation duly formed and organized under the laws of the State of Indiana), party of the first part, and the St. Louis, Alton and Terre Haute Railroad Company (a corporation duly formed and organized under the laws of the said State of Indiana, and also duly formed and organized under the laws of the State of Illinois), party of the second part:

Whereas heretofore, to wit, on or about the seventeenth day of May, in the year of our Lord one thousand eight hundred and sixty-

seven, at the special instance and request of the several railroad companies hereinafter in that connection named, and simultaneously with the execution and delivery by or on behalf of such companies of a contract of guaranty hereinafter mentioned, the said party of the second part to these presents duly executed a certain instrument in writing, in the words and figures following, to wit:

This indenture, made the seventeenth day of May, in the year of our Lord one thousaud eight hundred and sixty-seven, between the Terre Haute and Indianapolis Railroad Company (a corporation duly formed and organized under the laws of the State of Indiana), of the first part, and the St. Louis, Alton, and Terre Haute Railroad Company (a corporation duly formed and organized under the laws of the State of Indiana, and also of the State of Illinois), of the second part:

Whereas the party of the first part owns and operates a
12 certain railroad, extending from Indianapolis to Terre Haute, in the said State of Indiana, and the party of the second part owns and operates a certain railroad extending from Terre Haute aforesaid to East St. Louis, or Illinoistown, in the State of Illinois, together with a branch thereof running to Alton, in the said last-mentioned State;

And whereas it is considered by the parties hereto that their interests would be virtually promoted by having the said railroad, thus forming a continuous line from Indianapolis to East St. Louis, placed under one management and control, upon the terms and conditions hereinafter expressed:

Now, therefore, this indenture witnesseth, that the said parties of the first and second parts, for and in consideration of the premises, have covenanted, promised, and agreed, and by these presents do covenant, promise, and agree, to and with each other, in manner and form following, that is to say:

Article I.

The said party of the first part shall, will, and may, manage, operate, and carry on the business of a certain railroad, belonging to the party of the second part, and known as the principal or main line of the St. Louis, Alton and Terre Haute railroad, extending from Terre Haute, in the State of Indiana, to East St. Louis, or Illinoistown, in the said State of Illinois, and also a certain branch thereof, belonging to the party of the second part, and extending from a point on the said main line to Alton, in the said State of Illinois, for and during the period of ninety-nine years from the first day of June, in the present year of our Lord one thousand eight hundred and sixty seven, upon and subject to the terms and conditions of this indenture, and all and singular the provisions herein contained.

Article II.

The said party of the first part shall and will, within a reasonable time hereafter, finish and put in good order and condition, any and all unfinished portions of said main line of railroad, or of said Alton

branch thereof, and any and all parts or portions of either said main line or said branch which may be in inferior condition or out of repair; and thereafter, at all times during the said period of ninety-nine years, the said party of the first part, its successors and assigns, shall and will keep the said main line of railroad, and the said Alton branch thereof, in the order and condition of first-class western railroads, making from time to time all needful repairs, replacements, improvements of, and additions to the same, at the proper cost and expense of the said party of the first part, without deduction or abatement from the moneys hereinafter provided to be paid to the party of the second part; and the said party of the first part shall and will expend for improvements and equipments upon the said line of railroad, in addition to the ordinary expenses of operation, repair, and replacement, a sum not less in the aggregate than five hundred thousand dollars, before the thirty-first day of December, in the year one thousand eight hundred and sixty-eight.

13

ARTICLE III.

The said party of the first part shall and may, for and during the term aforesaid, use and apply, to and for the business of said main line and branch railroads, any and all depots, stations, station-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine shops, and other shops, and all depot grounds and other lands adjacent to the said main line and branch railroad, or either of them, or used or acquired for use in connection therewith, including certain depot grounds at East St. Louis aforesaid, being all that part of the property acquired from the Wiggins Ferry Company which lies north of a line beginning six hundred and eighty (680) feet south of the south line of Bogy street, or the centre thereof, and continued easterly, parallel to the north and south lines of the said property, so far as those lines are direct or nearly so, and thence protracted in a straight line to the eastern boundaries of the said property, reserving for the use of the Belleville branch the portion of the aforesaid property which lies southerly of the said line, and also reserving for the use of the Belleville branch the grounds east of Cahokia creek, in the extent and in the manner now occupied for coal yards for the accommodation of the said Belleville branch, and reserving also for the Belleville branch the shop at East St. Louis.

Provided, nevertheless, and it is hereby agreed, that for all the passenger, freight, and other business which may be hereafter done on or over what is now known as the Belleville branch, or any extension or connection thereof, except the transportation of coal, shall be provided by the party of the first part, all depot and station and other facilities at East St. Louis, as fully as the like business of the main line shall be provided for, for which facilities a just compensation shall be allowed and paid semi-annually; but in fixing such compensation, the value of the lands at East St. Louis and the cost of filling in of the same shall be excluded; and if at any time any disagreement shall occur as to the proper annual charge for

such facilities, such difference shall be submitted to three disinterested and experienced persons, one of whom shall be chosen by each party and the third by the two so first chosen, and the decision of a majority of such three persons shall be binding upon both parties hereto.

ARTICLE IV.

The party of the first part, keeping and performing this contract, shall, for the purpose of operating said main line of railroad and said Alton branch thereof, have the exclusive right to use upon the said railroads, for and during the term aforesaid, any and all locomotives, tenders, passenger and freight cars, and all other rolling stock and equipment, at the date hereof belonging to the party of the second part, a schedule of which is hereto attached, excepting, nevertheless, and reserving from the operation of these presents four (4) locomotives, three (3) passenger cars, one (1) baggage, express, and mail car, and fifteen (15) box cars, five (5) stock cars, and two (2) gravel cars, such locomotives and cars to be of average condition and value; and excepting and reserving also, as aforesaid, all coal cars heretofore used on the branch railroad of the party of the second part in conducting its regular coal traffic, extending from Belleville, in the said State of Illinois, to East St. Louis, or Illinoistown aforesaid, except such proportion of the said coal cars as have, on the average, been in the service of said main line during the year last past; and the said party of the first part shall and will,
14 within a reasonable time thereafter, purchase, supply, and own any deficiency of equipment or rolling stock that may be required by them for use upon the said railroads or either of them, and shall and will, at all times during the terms of ninety-nine years aforesaid, keep the said railroads fully and adequately furnished with rolling-stock and equipment for the transportation over the same, and over any part thereof, of any and all passengers, baggage, freight, mail, express, and any and all other matter which shall or may be offered, or required to be transported, at the rates fixed from time to time by the parties of the first part, in conformity hereto, on the said railroads, or over either or any part of either thereof, so that the said main line of railroad and the said Alton branch thereof shall be at all times during said term in order and condition of first-class Western railroads, so far as the rolling-stock and equipment thereof are concerned; and to that end the said party of the first part shall and will, from time to time, during the whole period aforesaid, at its own proper cost and expense, make or cause to be made any and all necessary repairs, replacements, renewals, construction and purchase of locomotives, tenders, passenger, baggage, and freight cars, which shall or may be used upon said railroads, or required for the use of the same, and of any and all other rolling-stock and equipment which may be from time to time in general use upon first-class Western railroads. In the event of this contract being terminated from any cause whatever, all the additional equipment and other movable property, including supplies furnished by the parties of the first part at their

own cost, shall be subject to removal by them, unless the parties of the second part should elect to purchase and pay for the same at its then value: Provided, nevertheless, That the equipment left upon the road shall be equal in quantity, quality, and value to that upon the road at the time when they took possession thereof.

ARTICLE V.

The party of the first part, operating the said railroads during the term aforesaid, shall from time to time have full authority to fix all rates of passenger fares, and of freights on all business done upon the said main line of railroad and the said Alton branch thereof: Provided, however, and it is hereby expressly declared and agreed, That for the purpose of expressing the limitation of such authority hereinafter provided, all business which shall be done partly on the St. Louis, Alton and Terre Haute railroad, and partly on the Terre Haute and Indianapolis railroad, or which shall be done partly on the St. Louis, Alton and Terre Haute railroad, and partly on either the Indianapolis, Cincinnati and Lafayette railroad, or on the Bellefontaine railway, or the Cleveland, Columbus and Cincinnati railway, or the Cleveland, Painesville and Ashtabula railroad, or the Pittsburgh, Fort Wayne and Chicago railway, or the Pennsylvania railroad, is herein denominated joint business, and that the rates on such joint business shall at no time and in no instance be fixed lower per mile for the said St. Louis, Alton and Terre Haute railroad, or the branch thereof. or for any part of the same, after proper allowance shall have been first made and deducted for terminal expenses, than shall be charged per mile on such joint business by or for the said Terre Haute and Indianapolis railroad, or by or for either of the aforesaid railroads upon which such joint business shall be partly done.

15

ARTICLE VI.

The said party of the first part, keeping and performing all and singular the terms, provisions, and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect, and receive any and all fares, charges, freights, tolls, rents, revenues, issues, and profits of the said main line of railroad, extending from Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

ARTICLE VII.

The party of the first part shall, in each and every year of the term of ninety-nine years, pay or cause to be paid to the party of the second part, in the manner and at the times hereinafter provided, thirty per cent. of the gross earnings of the said railroad from Terre Haute to East St. Louis, and the branch thereof to Alton, until such gross earnings for such year shall amount to the aggregate sum of two millions of dollars, and twenty-five per cent. of any excess over two millions of dollars, until the whole earnings

for such year shall amount to three millions of dollars, and twenty per cent. of any excess over three millions of dollars of gross earnings for such year, and such percentage of the gross earnings for each such year shall be paid over without any deduction, abatement, or diminution for any cause whatever; every demand or claim accruing or to accrue to the party of the first part, being hereby declared to be chargeable on that portion of the gross earnings which the said party is, by the next succeeding article hereof, empowered to retain as therein provided; but it is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and it is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

The manner and times of payment hereinbefore provided shall be as follows: On the first day of July, one thousand eight hundred and sixty-seven, and of every month in each year thereafter, shall be paid thirty-seven thousand and five hundred dollars for the month, being one equal twelfth part of the minimum payment herein provided to be made for each, any, and every year of the term aforesaid; and on the first day of August, one thousand eight hundred and sixty-seven, there shall be paid a sum which, added to the said thirty-seven thousand and five hundred dollars, shall amount to thirty per cent. upon the gross earnings for the month of June preceding, so far as such earnings can be approximately ascertained, according to the usual practice of railroad companies in making up their monthly accounts of gross earnings; and for each month after the said month of June payment shall in like manner be made of the excess over thirty-seven thousand five hundred dollars for such month; on the first day of the second month thereafter, and as soon as practicable after the close of each year, and within sixty days after such close, the aggregate gross earnings for the whole year shall be ascertained, and the balance, if any, from one party to the other, adjusted and paid, in conformity to the general provisions of this agreement. As soon as experience shall show that the fixed rate of thirty per cent. for the approximate monthly payments will regularly exceed the amount to be found payable in the yearly settlements, the rate for the approxi-
16 mate monthly payments shall be reduced in such extent and manner as the parties hereto may agree; but not at any time so as to create a foreseen balance from the party of the first part, which has the custody of the accounts and of the income.

For the convenience of having each fiscal year terminate with the thirty-first day of December in such year, the period between the first day of June, one thousand eight hundred and sixty-seven, and the first day of January, one thousand eight hundred and sixty-eight, shall be adjusted and settled as if the first year had completely terminated; but provided, nevertheless, that if it shall so happen that the amount of the gross earnings for such fraction of a year shall be larger than its proportion of a whole year, such excess be-

yond such proportion shall not operate to reduce the rate of the percentage payable to the party of the second part for such portion of a year; all payments herein required to be made to the party of the second part shall be made in the city of New York.

ARTICLE VIII.

The party of the first part shall be entitled to retain in each and every year of the aforesaid term all excess of gross earnings for such year over and beyond the payments to the party of the second part in the last preceding article provided, and to apply the same to and for the purpose of this agreement, and for fulfilling all the undertakings of the said party of the first part herein expressed, and to apply to its own benefit any surplus which may remain in any such year, as compensation for the services, acts, and things done or to be done by the said party of the first part in pursuance of these presents.

ARTICLE IX.

The said party of the first part shall at all times during the term aforesaid bear, and at its own proper cost and expense pay and discharge any and all costs, expenses, and charges whatsoever of operating and carrying on the business of said main line of railroad, and said Alton branch thereof, or either or any part of either of said railroads, or in any manner connected with, arising out of, or appertaining to the business operation or management of the same, and shall and will at all times during said term hold, save, and keep harmless and indemnified the said party of the second part of, from, and against any and all costs, charges, and expenses, suits, damages, and claims of any and every kind whatsoever arising out of, or in any manner appertaining to, or connected with, the management or operation during said term of the said railroads, or either or any part of either thereof, including not only the expenses of operating and carrying on the business of said roads, but also any and all claims for injuries to persons or property occurring on said road, or either or any part of either that may occur during said term, and any and all claims, suits, and demands for non-performance or breach of contract in respect to any person or thing to be transported over the same, and any and all claims and demands for the loss or destruction, by whatever cause, of any property whatsoever while under the control of the party of the first part, or which it shall have undertaken to carry on or transport over any portion of said railroad.

17 ARTICLE X.

The said party of the first part, its successors and assigns, shall and will at all times during the term aforesaid, pay, or cause to be paid, any and all taxes, assessments, and imposts of whatever kind which shall or may at any time during such term be charged, levied, assessed, or imposed upon the said main line of said railroad, and the said Alton branch thereof; or upon either or any part of either of said railroads or their appurtenances, or upon any

business or transactions done upon them or either of them, or upon any income arising therefrom, or upon any property whatsoever, the use of which during said term is hereby agreed to be furnished to the party of the first part, or which may be charged against or imposed upon the said party of the second part, its successors or assigns, for or on account of its or their ownership of the said railroads, or either or any part of either thereof, or of such property or any part thereof: Provided, however, That nothing in this contract contained shall be so constructed as to render the party of the first part in any way liable for the tax specifically upon the income of the holders of the bonds of stock of the party of the second part.

ARTICLE XI.

In case the party of the second part shall at any time or times make default in the payment of any interest which shall have been duly demanded on any first mortgage, second mortgage, preferred or income bonds, on any day on which the same shall be payable, or in the payment of any installment of the sinking fund, on any day when the same shall become payable the party of the first part may, without waiting for the expiration of the six months before such default of interest can be availed of by the bondholder, proceed at once to pay such interest, and to pay any installment of the sinking fund which may be overdue, and to deduct the payments therefor out of the next succeeding payment of thirty, twenty-five, or twenty per cent. of the gross earnings herein required to be made to the party of the second part, with interest at the rate of seven per cent from the time of such advances until the time when such payments would fall due; and every such advance, with interest as aforesaid, shall be duly credited to the party of the first part in the annual settlement; but any bonds of the party of the second part may, and at the maturity thereof shall, be paid or extended, or other bonds substituted for them, secured by the present or new deeds of trust, in the same manner and with the like effect as if these presents had not been executed, but the aggregate amount of such bonds, or of the annual interest charge created thereby shall not be increased, and in default of such extension or substitution, the party of the first part shall have the right to apply all surplus over the interest on the bonds outstanding, from the payments to which the party of the second part would be otherwise entitled, to the retirement of such overdue bonds.

ARTICLE XII.

All business destined to the East which may originate on the Belleville branch or any extension thereof to Athens or DuQuoin shall, so far as it may be properly influenced by the said party, be sent by the way of the aforesaid main line from East St. Louis to Terre Haute, and the said party of the first part hereby agrees that all business passing West over the said main line of railroad destined to points south of East St. Louis, shall, as far as can be so controlled, be sent over the Belleville branch now worked or as the same shall be when completed to DuQuoin, or to any other point south of Belleville.

ARTICLE XIII.

The party of the second part shall protect the party of the first part against all claims for right of way, and against all suits for injuries to persons or property arising prior to the first day of June, one thousand eight hundred and sixty-seven. Existing contracts and agreements entered into by the parties of the second part for business offices, ticket offices, and other business facilities in the city of St. Louis, and with the Wiggins Ferry Company, and with the several transportation, freight, express, sleeping car, and Western Union Telegraph and Transit Companies, or connecting railroads, shall be assumed and performed and fulfilled by the party of the first part hereto in the same manner and to the same extent as the party of the second part would be bound to observe and fulfill the same; and the party of the second part shall be protected and indemnified from and against any claim for a breach of any of said contracts arising after the first day of June, one thousand eight hundred and sixty-seven.

ARTICLE XIV.

The said party of the first part shall receive from the party of the second part, with the said main line and Alton branch, a share of all fuel, materials, tools, implements, and railroad supplies of every kind now belonging to the said party of the second part, *pro rata*, as one hundred and ninety-four miles are to fourteen miles, such *pro rata* share to be determined and agreed upon, and the articles selected and apportioned by and between George W. Cass on behalf of the party of the first part and Russell Sage on behalf of the party of the second part, which *pro rata* share of fuel, materials, tools, implements, and railroad supplies shall and may be used by the said party of the first part in carrying on the business of said main line and branch railroads during the term aforesaid.

All accounts of receipts and expenditures between the eleventh day of April and the first day of June, one thousand eight hundred and sixty-seven, shall be audited and settled by the said George W. Cass and Russell Sage, in such manner as they may deem to be just and equitable, such settlement and audit to be made in accordance with the original proposition of the parties of the second part, dated April eleventh, eighteen hundred and sixty-seven.

The party of the first part assumes and agrees to purchase four locomotives contracted for with Norris Brothers, of Lancaster, Pennsylvania, and also for about six hundred and fifty tons of iron purchased of the Iowa and Minnesota Railway Construction Company; and it is further agreed that at the expiration of thirty days after the party of the first part is in possession of the road of the second party, said first party shall pay to the second party a sum not exceeding twenty-five thousand dollars ($25,000.00), for supplies on hand purchased since the first of last January, which sum, together with the amount the said first party agrees to pay for rails now delivered, also for the locomotives purchased of Norris Brothers, and to be paid for by said first party, shall be deducted from the sum of

five hundred thousand dollars ($500,000.00) to be expended prior to the thirty-first day of December, eighteen hundred and sixty-eight, by said first party, as stipulated in article eleven.

Article XV.

The said party of the first part shall and will, during the whole period of ninety-nine years aforesaid, keep just, full, and true ac
counts of any and all business which shall or may be done
19 upon the said main line of railroad and the said Alton
branch thereof, or upon either or any part of either thereof, and of all moneys earned or received from or on account of such business, and shall render to the party of the second part, monthly during such period, a detailed approximate statement of such business, showing the receipts and disbursements on account thereof, and shall also, annually, to wit, on or before the first day of March, in each year, account to and with the party of the second part for any and all moneys earned or received as aforesaid for and during the year terminating with the thirty-first day of December preceding the time of such accounting, and the president of the party of the second part, or an agent duly authorized by the board of directors, shall at all reasonable hours and times during the term aforesaid, have the right to examine and inspect and there shall be produced and exhibited to them any and all books of account wherein shall be entered or which shall purport to contain any entry or statement relating to the business done on said main line and branch railroads, or on any part of either thereof during the term aforesaid, and any and all vouchers relating to such business, and shall also have the right to take transcripts from and copies of such entries or statements and of such vouchers.

Article XVI.

In case the party of the first part shall make default in any payment in the manner and at the times herein provided of either or any part of the fixed minimum, or of the estimated approximate monthly earnings, or any debit balance, ascertained at the end of any year, being part of the thirty, twenty-five, or twenty per cent. of the gross earnings hereinbefore required to be made to the party of the second part, or any portion thereof, at the time and in the manner herein required, and such default shall continue for sixty days, the party of the second part may at its election annul and vacate this contract by written notice to the party of the first part or may take such other or further action for the enforcement thereof as it may deem advisable.

Article XVII.

The said party of the first part shall at the end of such period of ninety-nine years, or other sooner termination of this contract, cease to operate said railroads, or either or any part of either of them, or to carry on the business of the same, and cease to demand, collect or receive any tolls, rents, issues or profits thereof, except such as

may have been earned before the expiration of said term, and the said party of the second part shall and may resume the exclusive management and control of said railroads, and the business thereof, and thereupon shall be able to take and apply to its (the said party of the second part) own use, the locomotives, tools, passenger, freight, baggage, express, and other cars of all classes, implements, materials, fuel, and supplies of all kinds, then on hand and belonging or appertaining to the said roads, an amount equal in quality and quantity and value to that belonging or appertaining to the said party of the second part, on the day on which said party of the first part shall be placed in possession of said roads, the said party of the second part repaying to the said party of the first part the sum of twenty-five thousand dollars ($25,000): Provided, however, That said second party may at its option retain all or any part of the surplus of locomotives, equipments, material, and supplies then on hand, upon paying therefor its actual value.

20 ARTICLE XVIII.

The said parties hereto shall and will, from time to time, and at all times hereafter, and as often as either of them shall be thereunto requested by the other, execute, deliver, and acknowledge any and all other instruments and assurances in the law, for the better and more effectually carrying out the object and intent of these presents, which counsel learned in the law shall reasonably advise, devise, or require, and which the said parties, by virtue of their present respective corporate powers and authorities, or of any powers or authorities, hereafter to be acquired by either of them at the time of the making of such request lawfully may execute, deliver, and acknowledge.

ARTICLE XIX.

This contract shall become operative as on the first day of June, one thousand eight hundred and sixty-seven.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereto affixed, and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

[SEAL.] ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
By CHARLES BUTLER, *President.*

Attest: H. C. BRYANT, *Secretary.*

And whereas on or about the said seventeenth day of May, in the year one thousand eight hundred and sixty-seven, the Indianapolis, Cincinnati and Lafayette Railroad Company, as party of the first part; the Pittsburgh, Fort Wayne and Chicago Railway Company, as party of the second part; the Pennsylvania Railroad Company, as party of the third part, and the Bellefontaine Railway Company, the Cleveland, Columbus and Cincinnati Railroad Company, and the Cleveland, Painesville and Ashtabula Railroad Company, jointly

forming the party of the fourth part, made and entered into a certain contract with the said St. Louis, Alton and Terre Haute Railroad Company, as party of the fifth part, bearing date on the said last-mentioned day, in and by which the said parties of the first, second, third, and fourth parts thereto covenanted, promised and guaranteed, to and with the said St. Louis, Alton and Terre Haute Railroad Company, that the instrument hereinbefore set forth and purporting to be between the Terre Haute and Indianapolis Railroad Company and the said St. Louis, Alton and Terre Haute Railroad Company should be duly executed by the said Terre Haute and Indianapolis Railroad Company on its part, on or before the first day of July next succeeding the date thereof; but it was provided, however, in the said contract of guaranty, that in case of the failure of the said Terre Haute and Indianapolis Railroad Company to execute said instrument as aforesaid, any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute, or some point on the road of the said party of the fifth part, to said contract of guaranty, westwardly of Terre Haute, should be accepted in lieu of the said Terre Haute and Indianapolis Railroad Company, subject to the provisions in said contract of guaranty contained;

21 And whereas the said Terre Haute and Indianapolis Railroad Company has failed to execute the said instrument hereinbefore set forth, and the said party of the first part to these presents has been duly organized as a corporation under the laws of the State of Indiana, for the purpose of constructing, owning, and operating a railroad from Indianapolis to a point on the road of the said St. Louis, Alton and Terre Haute railroad, in the county of Vigo, so as to connect with the road of the party of the second part, and form a continuous line therewith;

And whereas it has been proposed that the said party of the first part should be accepted by the said party of the second part hereto, in lieu and stead of the said Terre Haute and Indianapolis Railroad Company, and the said party of the second part hereto has consented to accept the said party of the first part hereto in the place and stead of the said Terre Haute and Indianapolis Railroad Company, subject to and upon the provisoes in the said contract of guaranty contained;

And whereas it is deemed to be for the manifest mutual benefit and advantage of the parties hereto, that the railroad to be constructed as aforesaid by the party of the first part, and the railroad of the party of the second part from Terre Haute, in the State of Indiana aforesaid, to East St. Louis, in the State of Illnois, and the branch of said last mentioned railroad, extending from a point on the main line to Alton, in said State of Illinois, should be under one management and control, upon and subject to all and singular the terms, agreements, covenants, and conditions in the said indenture, purporting to be between the said Terre Haute and Indianapolis Railroad Company and the said party of the second part thereto, and which is hereinbefore at length set forth:

Now, therefore, this indenture witnesseth, that the said parties of the first and second parts, for and in consideration of the premises

and of the mutual promises, agreements and undertakings herein contained, have covenanted, promised, and agreed, and by these presents do covenant, promise, and agree, to and with each other, as follows, that is to say:

The said party of the first part hereto, for itself, its successors, and assigns, for the considerations aforesaid, and for and in consideration of the sum of one dollar, to it duly paid by the said party of the second part, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, has covenanted, promised, and agreed, and by these presents does covenant, promise, and agree, to and with the said party of the second part hereto, its successors and assigns, that the said party of the first part hereto, its successors and assigns, shall, and will at all times, during the period of ninety-nine years mentioned in the said instrument, bearing date on the seventeenth day of May, in the year one thousand eight hundred and sixty-seven, and of which a copy is hereinbefore set forth, do and perform, and observe and keep, any and all matters and things whatsoever mentioned, set forth and expressed, or intended so to be in the said last mentioned instrument, to be done and performed, and observed and kept by the party of the first part thereto, in the same manner and with the same effect as if the party of the first part to these presents were named in the said instrument as the party of the first part thereto, and had at the date thereof duly executed and delivered the same.

And the said party of the first part to these presents hereby
22 adopts the said instrument, and assumes and takes the place of the said Terre Haute and Indianapolis Railroad Company, and promises, covenants, and agrees faithfully to fulfill, perform, carry out, and execute all and singular the promises and agreements in the said instrument, of which a copy is hereinbefore set forth, contained, on the part of the party of the first part thereto, and to make, from time to time, and at the several times therein mentioned, the payments therein provided to be made by the said Terre Haute and Indianapolis Railroad Company in the same manner and with the same effect in every particular as if the said instrument had at the date thereof been executed by the party of the first part hereto, and the name of the party of the first part hereto had been inserted therein instead of the name of the said Terre Haute and Indianapolis Railroad Company, wherever the name of the said last-mentioned company occurs in the said instrument, and as if all and singular the covenants, promises, and agreements in the said instrument hereinbefore set forth contained, on the part of the party of the first party thereto, were herein again at length repeated and set forth as the covenants, promises, and agreements of the party of the first part to these presents.

And the said party of the second part hereto, for itself, its successors and assigns, in consideration of the premises and of the sum of one dollar to it duly paid by the said party of the first part, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged, has covenanted, promised, and agreed, and by these presents does covenant, promise, and agree, to and with the said party

of the first part hereto, its successors and assigns, that the said party of the first part hereto executing this contract shall be entitled to and shall possess and enjoy all the rights, powers, and privileges under the same to which the said Terre Haute and Indianapolis Railroad Company would have been entitled if the said last-named company had duly executed and delivered the said contract, of which a copy is hereinbefore set forth, at the date thereof, and that the said party of the first part hereto shall and may manage, operate, and carry on the business of the said main line of railroad from Terre Haute to East St. Louis, and the said Alton branch thereof, and demand, collect, and receive any and all fares, charges, freights, tolls, rents, revenues, issues, and profits thereof upon the terms, agreements, and conditions in the said contract hereinbefore set forth contained, in the same manner as if the said party of the first party to these presents were the party of the first part named in said contract, instead of the said Terre Haute and Indianapolis Railroad Company.

In witness whereof, the said parties to these presents have caused their respective corporate seals to be hereto affixed, and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first above written.

[SEAL.] THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY,
By THOMAS A. MORRIS, *President.*

Attest: EDWARD KING, *Secretary.*

[SEAL.] ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
By CHARLES BUTLER, *President.*

Attest: H. C. BRYANT, *Secretary.*

23 EXHIBIT "C"

Being Second Guarantee Contract Referred to in Bill.

This indenture, made the eleventh day of September, A. D. one thousand eight hundred and sixty-seven, between the Indianapolis, Cincinnati and Lafayette Railway Company, of the first part; the Pittsburgh, Fort Wayne and Chicago Railway Company, of the second part; the Bellefontaine Railway Company, the Cleveland, Columbus and Cincinnati Railroad Company, and the Cleveland, Painesville and Ashtabula Railroad Company, jointly, of the third part; and the St. Louis, Alton and Terre Haute Railroad Company, of the fourth part.

Whereas, heretofore, to wit, on or about the seventeenth day of May, one thousand eight hundred and sixty-seven, the said party of the fourth part executed a certain instrument in writing, bearing date on said last-mentioned day, and purporting to be an indenture between the Terre Haute and Indianapolis Railroad Company and the said party of the fourth part, whereby it was agreed that the said Terre Haute and Indianapolis Railroad Company should manage, operate, and carry on the business of the main line of the railroad

of the said party of the fourth part, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the said State of Illinois, together with the branch thereof to Alton, in the said State of Illinois, upon the terms, agreements, and conditions in the said indenture mentioned and set forth, as by reference to said indenture, which, for greater convenience, is hereinafter designated and referred to as an operating contract, will more fully appear;

And whereas the said operating contract was duly executed by the said St. Louis, Alton and Terre Haute Railroad Company, as the party of the second part thereto, at the special instance and request of the said parties of the first, second, and third parts to these presents, and of the Pennsylvania Railroad Company, and upon the execution by or on behalf of the said parties of the first, second, and third parts and the said Pennsylvania Railroad Company of an agreement bearing date on said last-mentioned day, and which is hereinafter, for more convenient reference thereto, denominated an agreement of guaranty;

And whereas, in and by the said agreement of guaranty, the said parties of the first, second, and third parts hereto, and the said Pennsylvania Railroad Comyany, for and in consideration of the execution of said operating contract by the said party of the fourth part, and of the sum of one dollar to each of them duly paid, promised, agreed, and guaranteed to and with the said party of the fourth part to these presents, that the said Terre Haute and Indianapolis Railroad Company should, on or before the first day of July next succeeding the date thereto, duly execute and deliver to the said party of the fourth part to these presents the operating contract aforesaid: Provided, however, That in case of the failure of the said Terre Haute and Indianapolis Railroad Company so to do, any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute aforesaid, or to some point on the road of the said St. Louis, Alton and Terre Haute Railroad Company westwardly of Terre Haute aforesaid, should "be accepted in lieu of the said Indianapolis and Terre Haute Railroad Company," on certain conditions in the said agreement of guaranty contained;

24 And whereas in and by the said agreement of guaranty the said parties of the first, second, and third parts to these presents and the said Pennsylvania Railroad Company did further promise and agree and guarantee that the said Terre Haute and Indianapolis Railroad Company, or such other corporation as might be substituted therefor, should at all times thereafter "keep, observe, and perform all and singular the covenants, conditions, and provisions of the aforesaid contract," to wit, the contract herein designated as an operating contract;

And whereas the said contract of guaranty contained the following provisions, viz: "Provided, nevertheless, That all the obligations of each of the said parties of the first, second, third, and fourth parts created hereby shall be several and not joint, and as to each of them for the equal fourth part of any damages arising from any default of the said Terre Haute and Indianapolis Railroad Company, or the

said other corporation, or for any breach by all said parties to this agreement;

And whereas the said Terre Haute and Indianapolis Railroad Company has failed to execute the aforesaid operating contract, and the said Pennsylvania Railroad Company has failed to assist or take part in providing or nominating another corporation in place of the said Terre Haute and Indianapolis Railway Company as party of the first part to said operating contract, as contemplated by the said agreement of guaranty, and the said parties of the first, second, and third parts to these presents are desirous that a corporation nominated by them shall be accepted by the said St. Louis, Alton and Terre Haute Railroad Company as party of said operating contract, in the place and stead of the said Terre Haute and Indianapolis Railroad Company, but without prejudice, however, to any claim or claims which the said parties hereto, or any or either of them, have or may hereafter have against the said Pennsylvania Railroad Company, arising out of the execution by or on behalf of said Pennsylvania Railroad Company of the aforesaid agreement of guaranty;

And whereas the said parties of the first part, second and third parts have caused a new company to be duly organized under the laws of the State of Indiana, and by the name of the Indianapolis and St. Louis Railroad Company, and have requested the said party of the fourth part to accept said new company as the party of the first part to the said operating contract, and the said party of the fourth part has, in compliance with such request, agreed to accept the said new company in the place and stead of the Terre Haute and Indianapolis Railroad Company, but without waiving or intending to waive any claim against the said Pennsylvania Railroad Company, or any other party, arising out of anything in the premises mentioned or otherwise, and has at the special instance and request of the parties of the first, second, and third parts hereto, and in consideration of the execution of these presents, this day duly executed and delivered to the said Indianapolis and St. Louis Railroad Company an instrument in writing, bearing even date herewith, whereby the said Indianapolis and St. Louis Railroad Company has been substituted for and put in the place of the said Terre Haute and Indianapolis Railroad Company upon the terms and conditions therein and the said agreement of guaranty contained:

25. Now, therefore, this indenture witnesseth, that for and in consideration of the premises, and of the sum of one dollar to each of them duly paid, the receipt whereof is hereby acknowledged, the said parties of the first, second, and third parts to these presents, for themselves, their successors and assigns, have covenanted, promised and agreed, and by these presents do covenant, promise, agree, and guarantee, to and with the said party of the fourth part, its successors and assigns, that the said Indianapolis and St. Louis Railroad Company shall and will at all times hereafter keep, observe, and perform all and singular the covenants, conditions, and provisions of the said operating contract, bearing date on the 17th day of May, in the year of our Lord 1867, and of the said instrument bearing even date herewith, by which the said Indianapolis and St.

Louis Railroad Company has assumed, adopted, or become liable to carry out the said operating contract according to the true intent and meaning thereof:

Provided, nevertheless, That all the obligations of the parties of the first, second, and third parts hereto, created or intended to be created hereby, shall be several and not joint, and as to each of them for the equal third part of any and all damages which may arise from any default of the said Indianapolis and St. Louis Railroad Company, its successors or assigns, in the premises, or for any breach of this agreement by the said parties of the first, second, or third parts thereto.

In witness whereof, the said parties have caused their respective corporate seals to be hereto affixed, and the same to be attested by their respective presidents and secretaries, the day and year first above written.

Sealed and delivered in the presence of—
J. CHAPMAN.

THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE RAILWAY COMPANY,
Signed by H. C. LORD, *President.*
Attest: A. WORTH,
Sec. I., C. & L. R. R. Co.

PITTSBURGH, FORT WAYNE AND CHICAGO RAILROAD COMPANY,
Signed by S. W. CASS, *President.*
Attest: F. M. HUTCHINSON,
Sec. P., F. W. & C. R'y.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILROAD COMPANY,
Signed by L. M. HUBBY, *President.*
Signed: GEORGE H. RUSSELL,
Sec. C., C., C. & I. R'y.

THE LAKE SHORE RAILROAD COMPANY,
Signed by J. H. DEVERAUX, *Vice-President.*
Signed: GEORGE B. ELY,
Sec. L. S. R'y.

26 "EXHIBIT E."

Agreement between the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pittsburgh, Fort Wayne and Chicago Railway Company, dated May 1*st*, 1869.

Being the same referred to in paragraphs 22 and 23 of bill, and the performance of which is specifically assumed by the Pennsylvania Railroad Company under section 11 of its lease of the Pittsburgh, Fort Wayne and Chicago Railway.

This agreement, made and entered into this first day of May, A.

D. one thousand eight hundred and sixty-nine, by and between the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, its successors and assigns, a corporation existing under and by virtue of the laws of the States of Ohio and Indiana, party of the first part, and the Pittsburgh, Fort Wayne and Chicago Railway Company, its successors and assigns, a corporation existing under and by virtue of the laws of the States of Pennsylvania, Ohio, Indiana, and Illinois, party of the second part.

Whereas the Indianapolis and St. Louis Railroad Company, a corporation under and by virtue of the laws of Indiana, is the lessee of the main line of the St. Louis, Alton and Terre Haute railroad, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, together with the branch thereof to Alton, also in the State of Illinois, by virtue of a certain indenture or lease duly executed and delivered by the parties thereto, dated the eleventh day of September, A. D. one thousand eight hundred and sixty-seven; and

Whereas the full and faithful performance of the stipulations, covenants, and provisions of the said lease is guaranteed in and by virtue of a certain agreement, duly executed and delivered the 11th of September, A. D. 1867, by the Indianapolis, Cincinnati and Lafayette Railroad Company, party of the first part, and the Pittsburgh, Fort Wayne and Chicago Railway Company, party of the second part, and the Bellefontaine Railway Company, the Cleveland, Painesville and Ashtabula Railroad Company, party of the third part, and the St. Louis, Alton and Terre Haute Railroad Company, party of the fourth part; and

Whereas it has become necessary, in order that the said St. Louis, Alton and Terre Haute railroad may be connected properly and operated homogeneously with that portion of the railroad of the party of the first part which extends from Crestline, in the State of Ohio, the point of connection of the same with the railroad of the party of the second part, to Indianapolis, in the State of Indiana; that said Indianapolis and St. Louis Railroad Company should construct its proposed road from Indianapolis to Terre Haute, in the State of Indiana; and

Whereas the parties hereto are the sole and equal owners of the capital stock of the said Indianapolis and St. Louis Railroad Company, and further purpose to furnish or provide the residue of the means necessary for the construction of the said Indianapolis and St. Louis railroad; and

27 Whereas it was understood and agreed by and between the said Bellefontaine Railway Company and the said Pittsburgh, Fort Wayne and Chicago Railway Company, previous to the consolidation of the said Bellefontaine Railway Company with the said Cleveland, Columbus and Cincinnati Railroad Company, that the line of railroad of the said Bellefontaine Railroad Company, extending from Galion, Ohio, to Indianapolis, Indiana, together with its right of use of so much of the said Cleveland, Columbus and Cincinnati railroad as lay between the said Galion and Crestline, Ohio, should always be managed and operated, in all respects, dur-

ing the existence of the said lease of the said St. Louis, Alton and Terre Haute railroad, with strict impartiality, as between the said Cleveland, Columbus and Cincinnati Railroad Company and the said Pittsburgh, Fort Wayne and Chicago Railway Company; and

Whereas, by virtue of the said consolidation of the said Cleveland, Columbus and Cincinnati Railroad Company and the said Bellefontaine Railway Company, the original relations of the parties, guarantors of, and interested in the lease of the said St. Louis, Alton and Terre Haute railroad as aforesaid, have been modified; and

Whereas it is acknowledged to be to the mutual interest and benefit of the parties hereto that such mutuality in the management and operation of the railroad formerly known as the Bellefontaine railway, extending practically from Crestline to Indianapolis, as aforesaid, should be fully carried out, to the end that a perfect equality as to rates for business, direction of business, and facilities of every kind to the parties hereto, in connection with the enjoyment of the lease aforesaid, may be preserved and maintained, the largest possible business may be developed over the railroads of the parties hereto, the greatest economy produced in the management and operation of the line of railroad between Crestline and East St. Louis, and the public interest therein duly subserved:

Now, therefore, this agreement witnesseth, that for and in consideration of the foregoing premises, and for and in the further consideration of one dollar in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the parties hereto, their successors and assigns, do covenant, promise, and agree, to and with each other—

First. That during the existence of the said lease of the said St. Louis, Alton and Terre Haute railroad the general superintendent, general freight agent, and general passenger or ticket agent of the said Indianapolis and St. Louis Railroad Company shall be the general superintendent, general freight agent, and general passenger or ticket agent, for the purposes expressed in section second of that portion of the railroad of the party of the first part which extends from Crestline, Ohio, to Indianapolis, Indiana, not inconsistent with the proper working, as a united line, of so much of the railroad of the party of the first part as lies between Cleveland and Columbus, Ohio.

Second. The general superintendent shall have full and absolute control and management, under the instruction of president and board of directors of the said Indianapolis and St. Louis Railroad Company, of the composition and running of all through trains over the portion of railroad aforesaid of the party of the first part; the dictation and making of the necessary time schedules for the running of such trains; the procuring of all business for transportation thereon, other than that strictly local, to the portion of railroad aforesaid, or for which there may exist no competition between
28 the parties hereto; the fixing of the rates for the transporta-

tion of such business; the divisions or allotment of such rates between the companies interested therein; the making of the necessary business arrangements with other companies, and such control of the motive power and other equipment on the portion of railroad aforesaid as may be necessary in his judgment for the prompt, economical, and otherwise satisfactory running of the trains and doing of the business aforesaid.

Third. The party of the first part, its successors and assigns, shall appoint an efficient assistant or local superintendent, to whom, under the instructions of the general superintendent, shall be intrusted the direct charge of running of such through trains, and who, for this purpose, shall be under the control of the general superintendent, and the said general superintendent shall have control of such of the other officers or agents of the portion of railroad aforesaid as may be necessary for the complete and efficient carrying out of the provisions of section second; and the said assistant or local superintendent, or such other officer or officers of the party of the first part, its successors and assigns, as it shall designate, shall be charged with the proper maintenance of the motive power and other equipment and other machinery on the portion of railroad aforesaid, and also with the proper maintenance of such portion of railroad and structures, and the party of the first part, its successors and assigns, hereby promises and agrees, to and with the party of the second part, its successors and assigns, that such motive power and other equipment and other machinery, together with the portion of railroad and structures as aforesaid, shall always be kept and maintained in all respects fully equal, in the judgment of the said general superintendent, to the line of railroad and its similar appurtenances, operated under the directions of the said general superintendent, between Indianapolis, Indiana, and East St. Louis, Illinois.

Fourth. The salary and expenses of the said general superintendent, general freight agent, and general passenger or ticket agent; the expenses for procuring the business provided for in section second; the rates for the transportation of such business, and the time of the trains running between East St. Louis and Crestline, shall be divided by the said general superintendent *pro rata* between the companies interested therein, on the basis of the number of miles of railroad for which such expenses may be incurred, and over which such business may be done and trains run, and such salary and expenses shall be paid by the companies interested therein in the same proportion.

Fifth. The local business of the portion of railroad aforesaid, by which is meant that part of the transportation of freight and passengers as both emanate from and are destined to points on the portion of railroad aforesaid, or on that portion of the railroad of the party of the first part lying between Cleveland and Columbus, Ohio, or which emanate from or are destined to points that cannot be reached by the railroad and its connections of the party of the second

part, shall be managed and controlled by the party of the first part, its successors and assigns.

Sixth. All the earnings of the portion of railroad aforesaid shall be received, and the expenditures thereon and therefor, other than those for which a division is provided for in section fourth, shall be made, and the accounting therefor shall be done by the party of the first part, its successors and assigns; and all liability of every kind that may be incurred in the operation and management by the said general superintendent, as herein provided, of the portion of railroad aforesaid, shall only attach to the said party of the first part, its successors and assigns; and the said party of the first part, its successors and assigns, hereby agrees to indemnify and save harmless the said Indianapolis and St. Louis Railroad Company from the consequences of the operation and management by the general superintendent, as herein provided, of the portion of railroad aforesaid.

Seventh. The party of the first part, its successors and assigns, hereby agrees, on the requisition of the general superintendent, and at its, the party of the first part, its successors and assigns, own cost and expense, to provide and place on the portion of railroad aforesaid such additional motive power and other equipment, machinery, tools, tracks, buildings, and other structures, as in the judgment of the said general superintendent may be necessary for the prompt and economical transaction of the business hereinbefore committed to his charge on the portion of railroad aforesaid, and in the event of the failure of the party of the first part, its successors and assigns, after reasonable notice to so furnish the said additional facilities, the said Indianapolis and St. Louis Railroad Company is hereby authorized and empowered, in its discretion, to provide the said additional facilities at the cost of the party of the first part, its successors and assigns.

Eighth. The general superintendent shall, at all times and in every manner, manage and operate, as hereinbefore provided, the portion of railroad aforesaid so that strict impartiality shall be shown between the railroad of the party of the first part, its successors and assigns, between Crestline and Cleveland, Ohio, and the connections thereof, and the railroad of the party of the second part, its successors and assigns, between Crestline, Ohio, and Pittsburgh, Pennsylvania, and the connections thereof, as to rates for and direction of business, and as to facilities of every kind in connection with the enjoyment of the use of the said Indianapolis and St. Louis railroad and the St. Louis, Alton and Terre Haute railroad.

Ninth. The parties hereto, their successors and assigns, promise and agree, to and with each other, that, so far as they can control the same, they will cause all business passing over their respective railroads from the East, and destined to Indianapolis and points west thereof, that may be directly reached by the said Indianapolis

and St. Louis railroad and the said St. Louis, Alton and Terre Haute railroad and the connections thereof, to be sent *via* the line of railroad from Crestline to East St. Louis, mentioned and referred to herein.

Tenth. This agreement shall take effect as soon as the said Indianapolis and St. Louis railroad is completed for business.

In witness whereof, the parties hereto have caused their corporate seals to be hereto attached, and the same to be attested by the signatures of their respective presidents and secretaries, the day and year first above mentioned.

[SEAL.] THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY,
OSCAR TOWNSEND, *Vice-President.*

Attest: GEO. H. RUSSELL, *Secretary.*

[SEAL.] THE PITTSBURGH, FORT WAYNE AND CHICAGO RAILWAY COMPANY,
By G. W. CASS, *President.*

Attest: F. M. HUTCHINSON, *Secretary.*

EXHIBIT "D."

Indianapolis and St. Louis R. R. Co. in Account with St. Louis, Alton & Terre Haute Railroad Co.

DR.				CR.			
1878.				1878.			
May	1.	To rent due	37,500 00	Dec. 16.	By cash		28,655 10
June	"	"	37,500 00	1879.			
July	"	"	37,500 00	Jan. 14.	"		21,766 78
August	"	"	37,500 00	Feb. 15.	"		17,080 39
Sept.	"	"	37,500 00	Mar. 15.	"		19,576 27
Oct.	"	"	37,500 00	Apr. 14.	"		20,434 21
Nov.	"	"	37,500 00	May 15.	"		20,413 12
Dec.	"	"	37,500 00	June 14.	"		20,912 62
1879.				July 15.	"		18,696 73
Jan'y	"	"	37,500 00	Aug. 15.	"		26,645 60
Febr.	"	"	37,500 00	Sept. 15.	"		34,085 99
Mar.	"	"	37,500 00	Oct. 15.	"		34,843 90
Apr.	"	"	37,500 00	Nov. 17.	"		35,963 84
May	"	"	37,500 00	Dec. 17.	"		30,408 65
June	"	"	37,500 00	1880.			
July	"	"	37,500 00	Jan. 15.	"		31,025 99
Aug.	"	"	37,500 00	Feb. 14.	"		29,651 85
Sept.	"	"	37,500 00	Mar. 16.	"		30,619 41
Oct.	"	"	37,500 00	Apr. 16.	"		33,248 09
Nov.	"	"	37,500 00	May 20.	"		33,833 18
Dec.	"	"	37,500 00	June 15.	"		30,698 74
1880.				July 16.	"		32,570 27
Jan'y	"	"	37,500 00	Aug. 16.	"		38,897 91
Feb'y	"	"	37,500 00	Sept. 20.	"		43,386 79
Mar.	"	"	37,500 00	Oct. 16.	"		40,412 25
Apr.	"	"	37,500 00	Nov. 15.	"		42,899 65
May	"	"	37,500 00	Dec. 16.	"		35,088 98
June	"	"	37,500 00	1881.			
July	"	"	37,500 00	Jan. 14.	"		33,659 60
Aug.	"	"	37,500 00	Feb. 14.	"		31,610 63
Sept.	"	"	37,500 00	Mar. 14.	"		32,927 40
Oct.	"	"	37,500 00	Apr. 16.	"		42,894 08
Nov.	"	"	37,500 00	May 16.	"		38,986 22
Dec.	"	"	37,500 00	June 16.	"		28,003 60
188..				July 15.	"		29,537 59
Jan.	"	"	37,500 00	Aug. 16.	"		25,375 28
Feb'y	"	"	37,500 00	Sept. 17.	"		36,211 22
Mar.	"	"	37,500 00	Oct. 15.	"		38,174 84
Apr.	"	"	37,500 00	Nov. 16.	"		35,702 58
May	"	"	37,500 00	Dec. 14.	"		32,573 03
June	"	"	37,500 00	1882.			
July	"	"	37,500 00	Jan. 16.	"		31,497 46
Aug.	"	"	37,500 00	Feb. 14.	"		35,216 25
Sept.	"	"	37,500 00	Mar. 16.	"		28,331 64
Oct.	"	"	37,500 00	Apr. 11.	"		32,430 74
Nov.	"	"	37,500 00	May 16.	"		29,766 37
Dec.	"	"	37,500 00	June 17.	"		27,184 38
1882.				July 17.	"		29,342 59
Jan'y	"	"	37,500 00		Balance		541,358 24
Feb'y	"	"	37,500 00				
Mar.	"	"	37,500 00				
Apr.	"	"	37,500 00				
May	"	"	37,500 00				
June	"	"	37,500 00				
July	"	"	37,500 00				
			1,912,500 00				1,912,500 00

31 And afterwards, to wit, at the May term of said court, on the 14th day of July, 1883, before the Honorable Walter Q. Gresham, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, by counsel, and files its answer to the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company herein in the words following, to wit:

The Answer of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company to the Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company.

For answer to the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed in this case on the thirtieth day of October, 1882, the respondent, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, says as follows: It admits that this is an action for the foreclosure of the second and third mortgages upon the real estate, property, and franchises of the defendant, The Indianapolis and St. Louis Railroad Company, and that a decree of foreclosure and sale of said property was entered on the twenty-third day of May, 1882, and that in pursuance of said decree the property of said defendant railroad company was sold on the twenty-eighth day of July, 1882, for the sum of one million three hundred and ninety-six thousand dollars ($1,396,000), and is now the property, by purchase at said sale, of the Indianapolis and St. Louis Railway Company; but it shows further that the second mortgage, upon which said decree of foreclosure and sale was made, was given to secure bonds of said defendant railroad company to the amount of one million dollars, and that the court found in this proceeding that there was due upon such bonds, secured as aforesaid, including interest, the sum of one million one hundred ninety-seven thousand seven hundred forty-five dollars ninety-seven cents ($1,197,745.97), and that the same was a second lien upon the real estate, property, and franchises of the defendant railroad company, and subject only to the first mortgage of two million dollars, not foreclosed in said suit, and particularly described in said decree. And it further shows that the third mortgage, upon which said decree of foreclosure was rendered, was given to secure the bonds of said defendant company, amounting to five hundred thousand dollars, upon which the court found there was due, at the time of the rendition of said decree, the sum of six hundred ninety-nine thousand one hundred sixty four dollars and seventy-six cents ($699,164.76),

32 which was declared to be a third lien upon the real estate, property, and franchises of said Indianapolis and St. Louis Railroad Company, and next after the second mortgage above described; making a total sum of one million eight hundred ninety-six thousand nine hundred ten dollars and seventy-three cents ($1,896,910.73) found to be due by the court, and secured by said second and third mortgages, and decreed by the court to be a lien upon the property of said defendant railroad company, subject

only to the first mortgage above described, and prior and superior to all claims, liens, and demands of all other creditors of said defendant company, and subject only to the amount due and to become due upon the first mortgage upon said property, as found and ascertained by the court.

This respondent admits that William P. Fishback was appointed master commissioner for the purpose of hearing evidence in support of the claims of indebtedness in behalf of any creditor, secured or not, of said defendant railroad company, and to make report of his findings, as averred in said petition.

This respondent admits that on the eleventh day of September, 1867, an agreement was entered into by the Indianapolis and St. Louis Railroad Company, of which the copy filed with said petition as "Exhibit A" is a true and correct copy; but this respondent denies that the petitioner, The St. Louis, Alton and Terre Haute Railroad Company, by virtue of said lease, had any lien upon the property of the Indianapolis and St. Louis Railroad Company for the amount agreed to be paid to said petitioner by the Indianapolis and St. Louis Railroad Company as a rent for the railroad of said petitioner under said contract; but they say that the petitioner, The St. Louis, Alton and Terre Haute Railroad Company, stands in the same attitude as to said claim as any other unsecured creditor of said defendant railroad company.

This respondent admits that on the seventeenth day of May, 1867, the petitioner did, in form, by its president and secretary, execute an agreement, lease, or operating contract of that date, purporting to be made between itself and the Terre Haute and Indianapolis Railroad Company, filed with the intervening petition as Exhibit B, but which agreement was never executed by the said Terre Haute and Indianapolis Railroad Company, and never became a valid and subsisting contract between the petitioner and said Terre Haute and Indianapolis Railroad Company. And this respondent admits that said proposed contract contained the terms, stipulations, and engagements appearing upon the face thereof, and the respondent denies that it contained any other stipulations, covenants, or engagements.

This respondant denies that the Bellefontaine Railroad Company, the Cleveland, Painesville and Ashtabula Railroad Company, or the Cleveland, Columbus and Cincinnati Railroad Company, had any power or authority in law to execute such agreement, or that such corporations ever in fact executed said agreement or became bound thereby.

This respondent denies that on the eleventh day of September, 1867, a contract, called a contract of guaranty, filed with the intervening petition as Exhibit C, was properly executed by the petitioner and by the Indianapolis, Cincinnati and Lafayette Railroad Company, the Pittsburgh, Ft. Wayne and Chicago Railroad Company, the Bellefontaine Railway Company, the Cleveland, Painesville and Ashtabula Railroad Company, and the Cleveland, Columbus and Cincinnati Railroad Company, or either of them. It admits that in form such a contract was signed by the president of the Cleveland, Columbus, Cincinnati and

33 and Indianapolis Railway Company; but this respondent denies that the said alleged contract was executed on the eleventh day of September, 1867; and denies that it was ever formally signed by the parties thereto; and this respondent alleges the fact to be that it was signed at some time after the tenth day of April, 1868, the date of the consolidation of the railroad companies now constituting this answering respondent. This respondent admits that in form said last-mentioned contract contained the stipulations and engagements appearing on the face thereof, and it denies that it contained any other stipulations and agreements. And this respondent expressly denies that the respondent, or either of the railway companies which were consolidated into this respondent, and now constitute the same, have or had any corporate power or capacity whatever to enter into the said alleged contract of guaranty. And this respondent alleges that in point of fact the said contract was never submitted to or ratified by the stockholders of either of the railway companies now constituting this respondent, nor was it ever submitted to or ratified by the stockholders of this respondent. And this respondent alleges the fact to be that the said alleged contract of guaranty last mentioned was never legally entered into or executed by this respondent, and never created any valid or legal obligation against it. And this respondent expressly alleges and charges that the said last-mentioned contract of guaranty was never acted upon or carried out by the parties thereto; that the Indianapolis, Cincinnati and Lafayette Railroad Company became insolvent soon after the execution of said contract, and refused to carry out the same or to participate in any manner in its execution for the carrying out thereof. And this respondent further alleges that the said petitioner never accepted said last-mentioned contract of guaranty on its part; that it never acted upon the same or notified this respondent or the parties thereto in any legal or proper manner that it did accept and act upon the said guaranty. And this respondent expressly charges that the said alleged contract of guaranty never, in point of fact, became operative between the parties, and that whether it ever was regarded by them as obligatory, or binding, or not, that in fact all the parties to be affected thereby substantially abandoned and disregarded the same before anything was ever done or attempted to be done thereunder; and this respondent alleges that the said so-called contract of guaranty is and should be regarded as void, and in no respect binding upon the parties thereto.

This respondent further denies that the rental agreed to be paid by the Indianapolis and St. Louis Railroad Company constituted a part of the operating expenses of the Indianapolis and St. Louis Railroad Company.

This respondent denies that it was the duty of the defendant, The Indianapolis and St. Louis Railroad Company, to pay the rental for petitioner's railroad out of its earnings before it paid any of the interest upon its bonds.

This respondent further denies that the defendant railroad company diverted and appropriated its earnings to the improvement of its

property, in equipment and new construction, and the payment of the interest upon its bonds; but it states the fact to be that a large amount of the earnings of the Indianapolis and St. Louis Railroad Company, after the operating expenses of said road were paid, were diverted from the payment of the interest upon its bonds, and appropriated to the payment of the rent for the railroad of petitioner, to the amount of ——— dollars.

This respondent admits that the defendant railroad company was the lessee of the railroad of the petitioner, but it denies that it was leased or operated for the benefit of this respondent, or of any other railroad company besides the Indianapolis and St. Louis Railroad Company.

34 This respondent admits that it loaned to the defendant railroad company large sums of money, from time to time, for which it took and still holds the obligations of said defendant railroad company; and that it purchased the bonds of said defendant company, secured by said second and third mortgages, of which a large amount is still held by this respondent. And this respondent denies that it stands in any other or different relation to said defendant company than that of a creditor and holder of its stock and bonds.

This respondent admits that the alleged contract filed with the intervening petition as Exhibit E, and purporting to be a contract between this respondent and the Pittsburg, Ft. Wayne and Chicago Railroad Company, dated May first, 1869, was signed, as it purports to be, by Oscar Townsend, vice-president, and George H. Russell, secretary of this respondent, but it denies that said contract was executed with the consent, authority, or direction of this respondent or its board of directors or of its stockholders, and the same was never duly executed by this respondent corporation, and was *ultra vires* and of no effect, and did not bind either of said corporations by whose officers it purports to have been signed.

This respondent denies that the earnings of the St. Louis, Alton and Terre Haute railroad were the property of the petitioner after the execution of said lease; but avers that the petitioner was only entitled to have and receive from said defendant railroad company the rental agreed to by the terms of said lease, and avers that petitioner stood in the same attitude with reference to said rental as any other unsecured creditor of said defendant company.

This respondent admits that it is the holder of a large amount of the bonds secured by the second and third mortgages, set forth in said decree of foreclosure; and it shows to the court that by virtue of the said mortgages, and by the terms of said decree, they are prior to all the claims of the general creditors of said defendant company, and particularly prior to all claims of the petitioner for the unsecured debt described in said petition.

This respondent admits that there is due from the defendant railroad company to the petitioner, under and by the terms of said contract for rent, the sum of ——— dollars, which sum this respondent says is junior to the lien of the second and third mortgages set forth in said decree.

This respondent admits that the defendant railroad company made default in the payment to petitioner of the rent due to it under the terms of the operating contract, and so continued to make default from the first day of April, 1878, up to and including the twenty-eighth day of October, 1878. But it denies that the sum due according to the terms of said lease or operating contract as rent, was appropriated to the improvement, betterment, and new construction of its own line of railroad, or to the purchase of rolling stock and equipment, and to the payment of the interest upon its bonds for the benefit of the holders of securities of the said defendant railroad company.

This respondent admits that on the twenty-fifth day of October, 1878, the petitioner filed its complaint in this court against the said defendant company, and that a decree was entered in said cause on the twenty-sixth day of July, 1882; but it shows that in said decree the obligation of this respondent, and of all other parties to such alleged contract or guaranty, was adjudged and decreed to be a legal liability growing solely out of and resting solely upon the contract of guaranty, and not other or different, and imposing no obligation upon this respondent, or the other parties to such alleged contract, except the obligation of guarantors.

35 This respondent further shows that an appeal has been taken from the decree in said case to the Supreme Court of the United States, where the same is now pending, and an appeal bond has been duly executed and supersedeas granted in said cause.

This respondent admits that the defendant railroad company, upon taking possession of the railroad of petitioner, in the year 1867, received of petitioner supplies of the value of ninety-one thousand eight hundred sixty dollars and five cents ($91,860.05), which, by the terms of said lease, said lessee contracted and agreed to return or account for to said petitioner at the termination of said lease, upon the condition and in the manner therein set forth.

This respondent shows that whatever claims the petitioner may have against the defendant railroad company, growing out of the receipt of such supplies, that such claim does not constitute a lien upon the property of said defendant railroad company, and stands in the same attitude as the claim of any other unsecured creditor.

This respondent denies that any taxes yet remain unpaid which were assessed upon said Indianapolis and St. Louis Railroad Company, in the year 1873, which the said defendant company was bound by the terms of said lease or operating contract to pay; but this respondent shows that said defendant company has paid a large amount of taxes assessed against the capital stock of the petitioner, which said defendant railroad company as lessee was under no obligation by virtue of said lease or operating contract to pay.

This respondent admits that it is the owner of a large amount of the second and third mortgage bonds of said defendant railroad company, which it asserts are a first lien upon the funds in court, arising out of the sale of the property of said defendant railroad company.

This respondent denies all the other facts in the petition stated, and all grounds for relief therein alleged, and prays that this petition may be dismissed.

CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY,
By STEVENSON BURKE,
JOHN T. DYE,
Its Solicitors.

THE STATE OF OHIO, *Cuyahoga County,* } ss:

S. Burke, being sworn, says: He is the vice-president of the above answering defendant, and that all the facts stated in the foregoing answer are true, as he verily believes.

S. BURKE.

Signed in my presence, and sworn to before me, April 4, 1883.

J. T. WANN,
Notary Public.

And at the same time comes John H. Deveraux, receiver, by counsel, and files his answer to said intervening petition in the words following, to wit:

36 *The Answer of John H. Devereux, Receiver of the Indianapolis and St. Louis Railroad Company, to the Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company.*

For answer to the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed herein against him, John H. Devereux, receiver of the Indianapolis and St. Louis Railroad Company, says:

That under the tenth article of the lease or operating contract set forth as "Exhibit A" in said intervening petition, the Indianapolis and St. Louis Railroad Company did covenant and agree to pay, or cause to be paid, at all times during the term of the operating contract, all taxes, assessments, and imposts of whatever kind that should be charged, levied, assessed, or imposed upon the leased property, but he says the taxes assessed in 1873, 1874, 1875, and 1876, known as "capital stock taxes," were not assessed upon said railroad or leased property upon which the Indianapolis and St. Louis Railroad Company was bound to pay taxes by the terms of said lease, but were assessed upon the property of the St. Louis, Alton & Terre Haute Railroad Company, other than the property leased to the Indianapolis and St. Louis Railroad Company, consisting of its stocks, bonds, choses in action, and money, and that portion of its railroad and personal property and real estate not leased to the Indianapolis and St. Louis Railroad Company, all of which were embraced under the statutes of Illinois and the rules of the State Board of Equalization in the term "capital stock."

This respondent shows that the Indianapolis and St. Louis Rail-

road Company fully paid all taxes upon the railroad and tangible property leased to it by the St. Louis, Alton and Terre Haute Railroad Company, but that said company, over and above the portion of its railroad and tangible property leased to the Indianapolis and St. Louis Railroad Company, owned stocks, bonds, choses in action, and moneys, and real estate, and personal property, and a line of railroad in the State of Illinois which went to make up the value denominated and assessed as "capital stock," and upon which the Indianapolis and St. Louis Railroad Company was under no obligation to pay taxes.

The respondent shows that the rules adopted by the State Board of Equalization to ascertain the value of the capital stock was this: "To the market or fair cash value of the shares of capital stock add the market or fair cash value of the debt of the corporation (excluding that created for current expenses), and from this amount deduct the aggregate amount of the equalized or assessed valuation, as ascertained by the board, of all the tangible property of the corporation, the amount remaining to be taken as the fair cash value of the capital stock, including the franchises, which the board is to assess against such corporation." That the value of the stocks, bonds, choses in action, moneys, of the line of railroad and of the personal property and real estate owned by the St. Louis, Alton and Terre Haute Railroad Company, and not leased to the Indianapolis and St. Louis Railroad Company, was therefore embraced in the capital stock upon which the taxes aforesaid were levied; and that all these things, upon which the Indianapolis and St. Louis Railroad Company was under no manner of obligation to pay taxes, gave value to the stock and bonds of the St. Louis, Alton and Terre Haute Railroad Company, from the aggregate value of which, according to the rule of the Board of Equalization above set forth, the value of the tangible property (being the property leased to the Indianapolis and St. Louis Railroad Company, and upon which it agreed to pay taxes), was deducted to ascertain the value of the capital stock for the purposes of taxation.

37 The respondent further shows that a large sum of money was assessed as taxes upon the capital stock of the St. Louis, Alton and Terre Haute Railroad Company for the years 1873, 1874, 1875, and 1876, by the State Board of Equalization of the State of Illinois, and that the St. Louis, Alton and Terre Haute Railroad Company neglected and refused to pay the same, and that in order to save said property from sale and prevent levies and seizures, and be enabled to continue the operation of said railroad, the Indianapolis and St. Louis Railroad Company was compelled to pay large sums of money upon said taxes so assessed against the St. Louis, Alton and Terre Haute Railroad Company, and which the Indianapolis and St. Louis Railroad Company was not bound by the terms of said operating contract to pay.

And this respondent, your receiver, in order to protect said property, has been compelled to pay large sums of money upon said capital stock taxes for the St. Louis, Alton and Terre Haute Railroad Company.

A schedule of the sums thus paid is filed herewith as Exhibit "A."

This respondent shows that said sums are justly due from the St. Louis, Alton and Terre Haute Railroad Company.

He further shows that there is due from the St. Louis, Alton and Terre Haute Railroad Company an additional sum of —— dollars, for charges growing out of expenses at East St. Louis, for which the Indianapolis and St. Louis Railroad Company received no credit on the judgment rendered by this court on the thirtieth day of June, 1882.

This respondent admits that there is due the St. Louis, Alton and Terre Haute Railroad Company, for rental during the time of the receivership, the sum of $11,519.64 dollars, and he prays that said sum so due the St. Louis, Alton and Terre Haute Railroad Company for rent may be credited upon the indebtedness above set forth from said railroad company to the receiver, and that the residue of said indebtedness to the receiver the St. Louis, Alton and Terre Haute Railroad Company may be required to pay to this respondent, and that after the indebtedness from the St. Louis, Alton and Terre Haute Railroad Company to the receiver is paid the balance of the indebtedness from the St. Louis, Alton and Terre Haute Railroad Company, growing out of the payment of said capital stock taxes and operating expenses at East St. Louis, may be credited upon the judgment rendered in favor of the St. Louis, Alton and Terre Haute Railroad Company by this court against the Indianapolis and St. Louis Railroad Company and others, on the thirtieth day of June, 1882, and he prays for all further relief.

JOHN T. DYE,
Solicitor for J. H. Devereux, Receiver.

And at the same time comes the Pennsylvania Railroad Company, by counsel, and files its answer to said intervening petition in the words following, to wit:

38 *The Answer of the Pennsylvania Railroad Company to the Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company.*

For answer to the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed in this case on the thirtieth day of October, 1882, the respondent, The Pennsylvania Railroad Company, says, as follows:

It admits that this is an action for the foreclosure of the second and third mortgages upon the real estate, property, and franchises of the defendant, The Indianapolis and St. Louis Railroad Company, and that a decree of foreclosure and sale of said property was entered on the twenty-third day of May, 1882, and that in pursuance of said decree the property of said defendant railroad company was sold on the twenty-eighth day of July, 1882, for the sum of one million three hundred ninety-six thousand dollars ($1,396,000), and is now the property, by purchase at said sale, of the Indianapolis and St. Louis Railway Company; but it shows further that the

second mortgage, upon which said decree of foreclosure and sale was made, was given to secure bonds of said defendant railroad company to the amount of one million dollars, and that the court found in this proceeding that there was due upon such bonds, secured as aforesaid, including interest, the sum of one million one hundred ninety-seven thousand seven hundred forty-five dollars ninety-seven cents ($1,197,745.97), and that the same was a second lien upon the real estate, property, and franchises of the defendant railroad company, and subject only to the first mortgage of two million dollars not foreclosed in said suit, and particularly described in said decree.

And it further shows that the third mortgage, upon which said decree of foreclosure was rendered, was given to secure the bonds of said defendant company, amounting to five hundred thousand dollars, upon which the court found there was due, at the time of the rendition of said decree, the sum of six hundred ninety-nine thousand one hundred sixty-four dollars and seventy-six cents ($699,-164.76), which was declared to be a third lien upon the real estate, property, and franchises of said Indianapolis and St. Louis Railroad Company, and next after the second mortgage above described, making a total sum of one million eight hundred ninety-six thousand nine hundred ten dollars and seventy-three cents ($1,896,910.73) found to be due by the court, and secured by said second and third mortgages, and decreed by the court to be a lien upon the property of said defendant railroad company, subject only to the first mortgage above described, and prior and superior to all claims, liens, and demands of all other creditors of said defendant company, and subject only to the amount due and to become due upon the first mortgage upon said property, as found and ascertained by the court.

This respondent admits that William P. Fishback was appointed master commissioner for the purpose of hearing evidence in support of the claims of indebtedness in behalf of any creditor, secured or not, of said defendant railroad company, and to make report of his findings, as averred in said petition.

This respondent admits that on the eleventh day of September, 1867, an agreement was entered into by the Indianapolis and St. Louis Railroad Company, of which the copy filed with said petition as "Exhibit A" is a true and correct copy; but this respondent denies that the petitioner, The St. Louis, Alton and Terre Haute Railroad Company, by virtue of said lease, had any lien upon
39 the property of the Indianapolis and St. Louis Railroad Company for the amount agreed to be paid to said petitioner by the Indianapolis and St. Louis Railroad Company as rent for the railroad of said petitioner under said contract; but they say that the petitioner, The St. Louis, Alton and Terre Haute Railroad Company, stands in the same attitude as to said claim as any other unsecured creditor of said defendant railroad company.

This respondent admits that on the seventeenth day of May, 1867, the petitioner did, in form, by its president and secretary, execute an agreement, lease, or operating contract of that date, purporting

to be made between itself and the Terre Haute and Indianapolis Railroad Company, filed with the intervening petition as Exhibit B, but says said agreement was never executed by the said Terre Haute and Indianapolis Railroad Company, and never became a valid and subsisting contract between the petitioner and said Terre Haute and Indianapolis Railroad Company. And this respondent admits that said proposed contract contained the terms, stipulations, and engagements appearing upon the face thereof; and the respondent denies that it contained any other stipulations, covenants, or engagements.

And it states that the first guaranty contract set forth in the intervening petition was not executed by the respondent, nor by the authority and consent of its board of directors, nor by the authority of the board of directors of the Pittsburgh, Fort Wayne and Chicago Railway Company, and this respondent insists that said supposed contract of guaranty was and is *ultra vires*, and null and void as to each and all of the corporations by which it purports to have been executed, because neither of the parties thereto had any corporate power to enter into said supposed contract. And this respondent avers that said contract of guaranty never became binding on any of the parties thereto, because the operating contract of May 17, 1867, therein referred to, and purporting to be between the Terre Haute and Indianapolis Railroad Company, of the first part, and the St. Louis, Alton and Terre Haute Railroad Company of the second part, never was executed by said Terre Haute and Indianapolis Railroad Company, and it was not within the corporate powers of the complainant to agree with the other parties to said supposed agreement of guaranty to make such operating contract or lease of its road to a corporation which had no existence when said supposed agreement of guaranty was made, and it was also beyond the corporate powers of said several guaranteeing corporations by which said supposed agreement of guaranty purports to have been executed to guarantee that the said lease or operating contract would be accepted by a corporation that then had no existence, or to bind themselves as guarantees for a then non-existing corporation.

This respondent denies that the Pittsburgh, Ft. Wayne and Chicago Railway Company or the Pennsylvania Railroad Company had any power or authority in law to execute such agreement, or that such corporations ever in fact executed said agreement or became bound thereby.

This respondent denies that on the eleventh day of September, 1867, a contract, called a contract of guaranty, filed with the intervening petition as Exhibit C, was properly executed by the petitioner and by the Indianapolis, Cincinnati and Lafayette Railroad Company, the Pittsburgh, Ft. Wayne and Chicago Railroad Company, the Bellefontaine Railway Company, the Cleveland, Painesville and Ashtabula Railroad Company, and the Cleveland, Columbus and Cincinnati Railroad Company, or either of them,
40 and says the execution of said contract of guaranty was not within the corporate powers of the corporations alleged to have executed the same, and is void and of no effect.

This respondent further denies that the rental agreed to be paid by the Indianapolis and St. Louis Railroad Company constituted a part of the operating expenses of the Indianapolis and St. Louis Railroad Company.

This respondent denies that it was the duty of the defendant, The Indianapolis and St. Louis Railroad Company, to pay the rental for petitioner's railroad out of its earnings before it paid any of the interest upon its bonds.

This respondent further denies that the defendant railroad company diverted and appropriated its earnings to the improvement of its property, in equipment and new construction, and the payment of the interest upon its bonds; but it states the fact to be that a large amount of the earnings of the Indianapolis and St. Louis Railroad Company, after the operating expenses of said road were paid, were diverted from the payment of the interest upon its bonds, and appropriated to the payment of the rent for the railroad of petitioner, to the amount of ——— dollars.

This respondent admits that the defendant railroad company was the lessee of the railroad of the petitioner, but it denies that it was leased or operated for the benefit of this respondent, or of any other railroad company besides the Indianapolis and St. Louis Railroad Company.

This respondent admits that it loaned to the defendant railroad company large sums of money, from time to time, for which it took the obligations of said defendant railroad company; and that it purchased bonds of said defendant company, secured by said second and third mortgages. And this respondent denies that it assumed or stood in any other or different relation to said defendant company than that of a creditor and holder of its stock and bonds.

This respondent denies that the earnings of the St. Louis, Alton and Terre Haute railroad were the property of the petitioner after the execution of said lease; but avers that the petitioner was only entitled to have and receive from said defendant railroad company the rental agreed to by the terms of said lease, and avers that petitioner stood in the same attitude with reference to said rental as any other unsecured creditor of said defendant company.

This respondent admits that there is due from the defendant railroad company to the petitioner, under and by the terms of said contract for rent, the sum of ——— dollars, which sum this respondent says is junior to the lien of the second and third mortgages set forth in said decree.

This respondent admits that the defendant railroad company made default in the payment to petitioner of the rent due to it under the terms of the operating contract, and so continued to make default from the first day of April, 1878, up to and including the twenty-eighth day of October, 1878. But it denies that the sum due according to the terms of said lease or operating contract as rent was appropriated to the improvement, betterment, and new construction of its own line of railroad, or to the purchase of rolling stock and equipment, and to the payment of the interest upon its bonds for the bene-

fit of the holders of securities of the said defendant railroad company.

This respondent admits that on the twenty-fifth day of October, 1878, the petitioner filed its complaint in this court against the said defendant company, and that a decree was entered in said cause on the twenty-sixth day of July, 1882, but it shows that in said decree the obligation of this respondent, and of all other parties to such alleged contract of guaranty, was adjudged and decreed to be a legal liability growing solely out of and resting solely upon the contract of guaranty, and not other or different, and imposing no obligation upon this respondent, or the other parties to such alleged contract, except the obligation of guarantors.

41

This respondent further shows that an appeal has been taken from the decree in said case to the Supreme Court of the United States, where the same is now pending, and an appeal bond has been duly executed and supersedeas granted in said cause.

This respondent admits that the defendant railroad company, upon taking possession of the railroad of petitioner, in the year 1867, received of petitioner supplies of the value of ninety-one thousand eight hundred sixty dollars and five cents ($91,860.05), which, by the terms of said lease, said lessee contracted and agreed to return or account for to said petitioner at the termination of said lease, upon the condition and in the manner therein set forth.

This respondent shows that whatever claim the petitioner may have against the defendant railroad company, growing out of the receipt of such supplies, does not constitute a lien upon the property of said defendant railroad company, and stands in the same attitude as the claim of any other unsecured creditor.

This respondent denies that any taxes yet remain unpaid which were assessed upon said Indianapolis and St. Louis Railroad Company, in the year 1873, which the said defendant company was bound by the terms of said lease or operating contract to pay, but this respondent shows that said defendant company has paid a large amount of taxes assessed against the capital stock of the petitioner, which said defendant railroad company as lessee was under no obligation by virtue of said lease or operating contract to pay.

This respondent denies all the other facts in the petition stated, and all grounds of relief therein alleged, and prays said petition may be dismissed.

41½ *Evidence in Behalf of Petitioner.*

Be it remembered that, on the hearing of this intervening petition, the said St. Louis, Alton & Terre Haute Railroad Company, petitioner, in support of said intervening petition, introduced the following evidence, to wit:

1. The original bill, answers, interlocutory decree, and final decree in the case of The St. Louis, Alton & Terre Haute Railroad Company *vs.* The Indianapolis & St. Louis Railroad Company *et al.*, No. 6257, in chancery, in the circuit court of the United States for the district of Indiana; also the deposition of Charles Butler, being

pp. 109–131, inclusive, of the printed record in said cause; also the depositions of Henry C. Lord and George W. Parker, being pp. 133–188, inclusive, of the printed record in said cause; also the deposition of Russell Elliott, pp. 196–207 of the printed record in said cause; also the evidence of E. B. McClure, pp. 220–232, inclusive, of said printed record; which said pleadings, decrees, and evidence read in the words and figures following, to wit: (Here insert.)

2. Any and all pleadings, papers, and records in the said cause in which this intervening petition is filed, including reports of the master and of the receiver appointed in said cause, so far as any of said papers, records, and reports may be applicable to any issue joined upon this intervening petition.

The bill, answers, decrees, depositions, pleadings, papers, and records mentioned in above paragraphs 1 and 2, all being part of the record of the causes already appealed to and pending in the Supreme Court of the United States mentioned in the stipulation filed in this cause on June 27, 1884, and being fully covered by said stipulation, the same are omitted from this record.

JOHN M. BUTLER,
Solicitor for St. L., A. & T. H. R. R. Co.
JOHN T. DYE,
Solicitor for C., C., C. & I. R'w'y Co.

3. The following statement of the acting auditor for the receiver of the Indianapolis & St. Louis Railroad Company, under date of June 2, 1883:

INDIANAPOLIS, IND., *June* 2, 1883.

JOHN T. DYE, ESQ.,
General Attorney I. & St. L. R'y Co., City.

DEAR SIR: Upon Mr. Butler's request, handed me by yourself, I submit herewith "Schedule A," showing notes of the I. & St. L. R. R. Co. to the C., C., C. & I. R'y Co., prior to Nov. 24, 1881, and "Schedule B," showing notes of the I. & St. L. R. R. Co. to the Pennsylvania Co. prior to Nov. 24, 1881; the total amounts of which are respectively as follows:

Notes to C., C., & I.	$873,585 12
Notes to Penna. Co.	583,585 12

The dates and amounts of the notes given subsequent to November 24, 1881, amounting to $125,000, as shown by Commissioner Fishback's report of Nov. 23, 1882, page 2, are as follows:

December 16, 1881	$75,000
January 28, 1882	50,000

The dates and amounts of the Cleveland Rolling Mills Co.'s item of $103,922.75, as also shown on Commissioner Fishback's report of Nov. 23, 1882, are as follows:

1882.

Jan'y Voucher No. 646. Material delivered in December, 1881	$36,882 97
Jan'y Voucher No. 647. Material delivered in December, 1881	2,051 50

1882.	
Feb'y Voucher No. 585. Material delivered in December, 1881	$713 84
March Voucher No. 631. Material delivered in February, 1882	57,561 68
March Voucher No. 632. Material delivered in February, 1882	2,510 09
March Voucher No. 632. Material delivered in March, 1882	1,473 48
42 March Voucher No. 633. Material delivered in February, 1882	1,449 53
March Voucher No. 633. Material delivered in February, 1882	1,423 95
March Voucher No. 633. Material delivered in March, 1882	438 21
Total of vouchers	$104,505 25
Less amount charged against C. R. M. Co., in account deducted before making notes	582 50
	$103,922 75

Hoping the information given may be found satisfactory, I am respectfully yours,

P. A. HEWITT,
Acting Auditor.

INDIANAPOLIS, IND., *June* 2, 1883.

SCHEDULE A.

Detailed Statement of Notes given the C., C., C. & I. R'y Co., amounting to $873,585.12, *as shown by Commissioner Fishback's Report, filed November* 23, 1882. *Page* 3.

Date.	Amount.
1875.	
August 12	$37,500 00
September 25	17,500 00
October 2	61,200 00
October 2	46,818 00
October 2	36,414 00
October 30	36,000 00
1876.	
March 1	20,000 00
April 1	10,000 00
May 1	45,000 00
June 30	40,000 00
September 30	40,000 00
December 30	50,000 00

Date.	Amount.
1877.	
June 30	$34,000 00
September 1	15,000 00
December 29	21,500 00
December 31	25,000 00
1878.	
March 1	15,000 00
April 1	20,000 00
June 1	12,653 12
1881.	
July 1	42,000 00
October 1	100,000 00
November 1	68,000 00
November 22	80,000 00
Total	$873,585 12

INDIANAPOLIS, IND., *June* 2, 1883.

SCHEDULE B.

Detailed Statement of Notes given the Pennsylvania Co., amounting to $583,585.12, *as shown by Commissioner Fishback's Report, filed November* 23, 1882. *Page* 3.

Date.	Amount.
1875.	
August 12	$37,500 00
September 25	17,500 00
September 26	36,414 00
October 2	46,818 00
43 October 2	61,200 00
October 30	36,000 00
1876.	
March 1	20,000 00
April 1	10,000 00
May 1	45,000 00
June 30	40,000 00
September 30	40,000 00
December 30	50,000 00
1877.	
June 30	34,000 00
September 1	15,000 00
December 29	21,500 00
December 31	25,000 00

Date.	Amount.
1878.	
March 4	$15,000 00
April 1	20,000 00
June 1	12,653 12
Total	$583,585 12

4. The following deposition of Henry T. Nash:

INDIANAPOLIS, IND., *June* 22, 1883.

Evidence taken in behalf of petitioner. Present: H. A. Weal and John M. Butler, for petitioner, and John T. Dye, solicitor for respondents.

HENRY T. NASH, being duly sworn, testified as follows:

Interrogatories by Mr. BUTLER:

Q. Please state your name, residence, and occupation.

A. H. T. Nash, St. Louis, Mo.; auditor of the St. Louis, Alton & Terre Haute Railroad Company.

Q. You may state how long you have been acting as auditor for railroad companies.

A. A little more than ten years.

Q. You may state if you have recently had full access to the books and records of the Indianapolis & St. Louis Railroad Company, and to the books and records kept by the receiver of the Indianapolis & St. Louis Railroad Company during the receivership recently terminated.

A. I have.

Q. You may state, Mr. Nash, if you have compiled from said books and records statements showing the gross earnings and operating expenses of the Indianapolis & St. Louis Railroad Company, on the Indianapolis & St. Louis railroad proper, from the time said road was opened for business up to the appointment of a receiver, May 24, 1882.

A. I have.

Q. Can you give said gross earnings and operating expenses for each of said years and the fractional parts of the years 1870 and 1882 separately, and will you make such written statement your answer to this question?

A. I can, and do herewith furnish a statement and make the same part of my answer as Exhibit "A."

44 H. T. NASH. EXHIBIT "A."

Statement of the Gross Earnings and Operating Expenses of the Indianapolis Division of the Indianapolis and St. Louis Railroad from 1870 *to May* 24, 1882.

Year.	Gross Earnings.	Operating Expenses.	Net Earnings.
1870	$266,997 59	$141,731 93	$125,265 66
1871	671,556 72	385,142 01	286,414 71
1872	690,229 48	403,910 89	286,318 59
1873	731,414 88	427,574 05	303,840 83
1874	614,326 27	385,781 52	228,544 75
1875	526,427 39	370,969 94	155,457 45
1876	521,137 62	365,326 73	155,810 89
1877	475,780 53	288,848 40	186,932 13
1878	418,443 11	325,068 83	93,374 28
1879	459,976 97	265,707 37	194,269 60
1880	592,683 88	420,383 23	172,300 65
1881	602,375 52	559,007 10	43,368 42
1882	192,016 97	263,523 90	—71,506 93
	6,763,366 93	4,602,975 90	2,160,391 03

"Exhibit A." H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. I will ask you if you have prepared a statement showing the gross earnings and operating expenses of the Indianapolis and St. Louis railroad proper during the receivership, to wit, from May 24, 1882, to October 1, 1882?

A. I have.

Q. Will you furnish such statement as your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "B."

"EXHIBIT B."

Statement of Earnings of Indianapolis Division of the Indianapolis and St. Louis Railroad, from May 24, 1882, *to October* 1, 1882. *J. H. Devereux, Receiver.*

"B." Earnings $243,045 16

H. T. NASH,
Auditor St. L., A. & T. H. R. R.

June 22, 1883.

Statement of Expenses of Indianapolis Division of the Indianapolis and St. Louis Railroad, from May 24, 1882, *to October* 1, 1882.

Total $201,442 21

"Exhibit B." H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. I will ask you to state if you have made a statement showing the sale and discount upon sales of the mortgage bonds issued by the Indianapolis and St. Louis Railroad Company?

A. I have.

Q. Will you furnish such statement as your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "C."

EXHIBIT "C."

Statement of the Issues of Bonds of the Indianapolis & St. Louis Railroad Company and Discounts on Same.

DISCOUNT.	FIRST MORTGAGE BONDS.	BONDS.
	Issued January, 1870	$1,005,000 00
	March, 1870	225,000 00
	April, 1870	395,000 00
	May, 1870	300,000 00
	December, 1870	75,000 00
45		
$200,000 00	Total	$2,000,000 00

	SECOND MORTGAGE BONDS.	
$83,750 00	To C., C., C. & I. R. R. Co., Dec., 1870	$335,000 00
25,000 00	" " " April 4 to 14, 1871	100,000 00
16,250 00	" " " May, 1871	65,000 00
83,750 00	" Penna. R. R. Co., Dec., 1870	335,000 00
25,000 00	" " " April 4 to 14, 1871	100,000 00
16,250 00	" " " May, 1871	65,000 00
$250,000 00	Total	$1,000,000 00

	EQUIPMENT BONDS.	
	To trustees for services, Dec., 1871	2,000 00
5,000 00	" C., C., C. & I. R. R. Co., Dec. 19, '71	50,000 00
11,800 00	" " " Dec. 29, 1871	118,000 00
2,000 00	" " " July, 1873	20,000 00
12,200 00	" " " March, 1874	61,000 00
5,000 00	" Penna. R. R. Co., Dec. 19, 1871	50,000 00
11,800 00	" " Dec. 29, 1871	118,000 00
2,000 00	" " July, 1873	20,000 00
12,200 00	" " March, 1874	61,000 00
$62,000 00	Total	$500,000 00

" Exhibit C."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. In said statement will you furnish the dates of the sales?

A. So far as I can find them in the books.

Q. I will ask you if you have prepared a statement showing the payments made by the Indianapolis and St. Louis Railroad Company proper, upon interest coupons upon bonds issued by it under the several mortgages issued by it, separately for each year from the time said bonds were issued down to the present time?

A. I have.

Q. Will you make such statement a part of your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "D."

EXHIBIT "D."

Statement of Interest Paid on Indianapolis & St. Louis Railroad Company's Bonds, from 1870 *to Oct.* 1, 1882.

Year.	First Mortgage.	Second Mortgage.	Equipment.	Total.
1870	$42,136 62	$23,345 00	----------	$65,481 62
1871	140,000 00	64,225 00	$4,080 00	208,305 00
1872	140,000 00	70,000 00	27,000 00	237,000 00
1873	139,930 00	70,000 00	28,640 00	238,570 00
1874	139,965 00	70,000 00	37,560 00	247,525 00
1875	140,000 00	70,000 00	40,000 00	250,000 00
1876	140,000 00	70,000 00	400,00 00	250,000 00
1877	140,000 00	67,410 00	40,000 00	247,410 00
1878	140,000 00	14,595 00	----------	154,595 00
1879	109,200 00	----------	----------	109,200 00
1880	109,200 00	----------	----------	109,200 00
1881	109,200 00	----------	----------	109,200 00
1882	7,910 00	----------	----------	7,910 00
	$1,497,541 62	$519,575 00	$217,280 00	$2,234,396 62

"Exhibit D."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

46 Q. I will ask you if you have made up a statement showing the amount expended by the Indianapolis and St. Louis Railroad Company for additional construction, improvement, and equipment for each year from the opening of the road for business down to the present time?

A. I have.

Q. And will you make the same part of your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "E."

EXHIBIT "E."

Statement of Cost of Road and Equipment of Indianapolis and St. Louis Railroad, from Indianapolis to Terre Haute, to May 23d, 1882.

To July 1st, 1870		$2,766,115 64
From " 1st, 1870, to Dec. 31st, 1870		412,249 16
1871		417,669 58
1872		98,022 08
1873		168,741 56
1874		103,816 99
1875		
1876		33,337 92
1877		3,111 83
1878		7,744 25
1879		130,477 60
1880		24,583 42
1881		93,695 78
1882, to May 23d, inc.		233,576 92
		$4,493,142 73
Less amount credited to above account in year 1875		10,038 40
		$4,483,104 33

"Exhibit E."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, '83.

Q. Have you made a statement showing the amount paid by the Indianapolis and St. Louis Railroad Company, from the time it issued bonds under its several mortgages down to the present time, to the sinking fund for the payment of said mortgages?

A. I have.

Q. Will you make such a statement a part of your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "F."

EXHIBIT "F."

Statement of Sinking Fund Account of Indianapolis and St. Louis Railroad from 1870 *to May* 24, 1882.

Total to January 1, 1877	$25,333 07
Paid in 1877	16,666 67
Paid in 1878	5,810 00
Total balance shown by ledger	$47,809 74

"Exhibit F."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. I will ask you to state if you have ascertained the amount received by the receiver in money earned by the Indianapolis and St. Louis railroad proper prior to the receivership?

A. I have not.

47 Q. In your interest account, an exhibit of which you have already agreed to furnish, have you included any payments of interest made by the receiver?

A. No.

Q. Will you make a statement showing the amount of interest paid by the receiver?

A. I will, and do herewith furnish a statement and make the same part of my answer as Exhibit "G."

EXHIBIT "G."

Statement of Interest on Indianapolis and St. Louis Railroad Company Bonds paid by J. H. Devereux, Receiver, from May 24, 1882, to October 1, 1882.

First mortgage	$11,585 00

"Exhibit G."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. Have you made any statement showing the gross earnings from all sources, and the operating expenses of the leased line, operated by the Indianapolis and St. Louis Railroad Company, during the receivership, to wit: From May 24, 1882, to October 1, 1882?

A. I have.

Q. Will you furnish such a statement and make the same part of your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "H."

EXHIBIT "H."

Statement of Earnings of St. Louis Leased Division of the Indianapolis and St. Louis Railroad from May 24, 1882, to Oct. 1, 1882.

	$557,475 44
Less	1,118 89
Total	$556,356 55

Statement of Operating Expenses of St. Louis Leased Division of the Indianapolis & St. Louis Railroad from May 24, 1882, to Oct. 1, 1882.

Total	$507,341 18

"Exhibit H."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 22, 1883.

Q. Can you furnish a copy of the new lease entered into between the St. Louis, Alton and Terre Haute Railroad Company and the Indianapolis and St. Louis Railway Company, and will you do so?

A. I will, and herewith furnish same, marked Exhibit "J."

Adjourned until Monday, June 25, 1883.

48 This indenture, made and entered into this 23d day of February, A. D. one thousand eight hundred and eighty-three, by and between the St. Louis, Alton and Terre Haute Railroad Company, a corporation duly formed and organized under the laws of the States of Illinois and Indiana, lessor, party of the first part, and the Indianapolis and St. Louis Railway Company, a corporation duly formed and organized under the laws of the State of Indiana, and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, a corporation duly formed and organized under the laws of the States of Ohio and Indiana, (successors of the Indianapolis and St. Louis Railroad Company, by purchase at the judicial sale of its property and franchises, and its rights as lessee of the property hereinafter described,) joint and several lessees, party of the second part, is entered into in accordance with, and in consideration of, a certain memorandum of agreement, made on the 17th day of November, 1882, by and between J. H. Devereux and W. Bayard Cutting, which memorandum of agreement is annexed hereto, and referred to as a part of this indenture, and is a consideration for the execution of the same, in that it establishes a through line from New York to St. Louis via the New York Central and Hudson River railroad and the railroads of the parties hereto:

Whereas the party of the first part owns a certain railroad extending from East St. Louis, in the State of Illinois, to Terre Haute, in the State of Indiana, known as its main line, together with a certain branch to Alton, in said State of Illinois, known as its Alton branch; and the party of the second part owns and operates a continuous line of railroad from Terre Haute aforesaid, by way of Indianapolis, in the State of Indiana, to Cleveland, in the State of Ohio;

And whereas it is considered by the said parties hereto that their interests would be mutually promoted by having the said railroads, thus forming a continuous line from Cleveland to East St. Louis, placed under one management and control, upon the terms and conditions hereinafter expressed:

Now, therefore, this indenture witnesseth, that the said parties of the first and second parts, for and in consideration of the premises, have covenanted, promised, and agreed, and by these presents do covenant, promise and agree, to and with each other, in manner and form following, that is to say:

ARTICLE 1. The said party of the second part may, will, and shall maintain, manage, and operate a certain railroad belonging to the party of the first part, and known as the main line of the St. Louis, Alton and Terre Haute railroad, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, about one hundred and eighty-nine miles, and also a certain branch

thereof, belonging to the party of the first part, and extending from a point on said main line to Alton, in the State of Illinois, about four (4) miles, for and during the period of ninety-nine years from the first day of November, in the year of our Lord one thousand eight hundred and eighty-two, upon and subject to the terms and conditions of this indenture, and all and singular the provisions herein contained.

ARTICLE 2. The said party of the second part shall and will, within a reasonable time hereafter, finish and put in good order and condition any and all unfinished portions of said main line of railroad, or of said Alton branch thereof, and any and all parts or portions of either said main line or said branch which may be inferior in condition or out of repair; and thereafter, at all times during the said period of ninety-nine years, the said party of the second part, its successors and assigns, shall and will keep the said main line of railroad and the said Alton branch thereof in the order and condition of a first-class railroad, making from time to time all needful repairs, replacements, improvements of and additions to the same, at the proper cost and expense of the said party of the second part, without deduction or abatement from the moneys hereinafter provided to be paid to the party of the first part; which improvements and additions shall include, among others, the laying the entire length of said leased line with steel rails, and the ballasting the same with broken stone or gravel, at as early a day as said work can be done with due regard to economy.

ARTICLE 3. The said party of the second part shall and may, for and during the term aforesaid, use and apply to and for the business of said main line and branch railroads, any and all depots, stations, station-houses, freight-houses, wood-houses, and other buildings, and all machine-shops, and other shops, and all other grounds and other lands adjacent to the said main line and branch railroad, or either of them, or used or acquired for use in connection therewith, including certain depot grounds abutting on Front street, in East St. Louis aforesaid, being all that part of the property acquired by said party of the first part from the Wiggins Ferry Company which lies north of a line beginning at a point on the west boundary of said property at Front street, four hundred feet north of the north line of Pratt street, running thence easterly, parallel to the said north line of Pratt street, so far as said street extends, and
49 thence protracted in a straight line to the easterly boundary of said property, reserving for the use of the Belleville branch and extension the portion of the aforesaid property which lies southerly of the said line, and also reserving for the use of the Belleville branch and extension all the property of the said first party lying east of Cahokia creek, in said city of East St. Louis, bounded on the north by Broadway and the ground at present occupied by said main line track leading to the said property purchased from the Wiggins Ferry Company: Provided, nevertheless, That all of said ground purchased from the Wiggins Ferry Company west of Cahokia creek (except a strip 200 feet in width on the south side thereof, now occupied by said first party as its coal yard) shall continue to be

used jointly by said first and second parties for terminal business as at present, and until either party hereto shall elect to maintain a separate freight depot and station at East St. Louis. When either party hereto shall so elect to dissolve the present joint occupancy and maintain a separate depot at East St. Louis, the said second party shall and will, without delay, at its own expense, remove its tracks and other obstructions from the strip of ground two hundred feet in width between Front street and the old river bed, corresponding in length with the adjacent yards, being the north two hundred feet of the portion of said station ground heretofore reserved by and for the exclusive use of said first party. After said ground shall have been so surrendered free from tracks, said first party shall enter upon and possess the same, and lay necessary tracks and construct necessary buildings thereon, for its own especial use, and thereafter each party hereto shall establish and maintain its separate agency, and transact its terminal business at East St. Louis on its own grounds, as the same are defined and bounded in this article. Until such separation said second party shall pay all taxes, general and special, that shall be levied, assessed, or imposed upon all the said grounds so jointly occupied for station or depot purposes, and after such separation all such taxes shall be paid by each party upon the portion of land which each separately occupies. And provided, further, That said first party hereby also reserves to itself the right to maintain its present connections with said main line track or tracks so leased to said second party north of Broadway, and during the continuance of this lease shall have and enjoy the full use of the tracks of said second party for making connections with the tracks and yards of the St. Louis Bridge Company in East St. Louis, and with the East St. Louis or relay depot, as the same are now or may hereafter be established, for the transaction of its necessary business therewith, and shall also have free use of the tracks of said second party for the delivery and transfer of business between its said Belleville branch, or any extension thereof, and all terminal points and connecting lines at East St. Louis with which said tracts may connect. This use of the tracks of said second party at East St. Louis by said first party shall be in harmony with the use of the same by said second party, and subject to such reasonable rules and regulations as may be imposed by said second party, it being understood that said first party is, during the continuance of this lease, to have and enjoy the free use of the tracks of said second party, to reach all connections and terminal points at East St. Louis, for the receiving, delivery, and transfer of all business destined to and from said Belleville branch and extension, to the extent and in like manner as if said first party retained possession, control, and operation of said leased property. And to make such joint use of tracks practicable and safe said second party shall complete and maintain a double main track between the present junction of the tracks of the said Belleville branch with said main line near Broadway, and what is known as Bridge Junction, where the main line connects with the Chicago and Alton railroad, near the north boundary line of the city of East St. Louis.

ARTICLE 4. The party of the second part, keeping and performing this contract, shall, for the purpose of operating said main line of railroad and said Alton branch thereof, have the exclusive right to use upon the said railroads, for and during the term aforesaid, any and all locomotives, tenders, passenger and freight cars, and all other rolling-stock and equipment employed on said leased property, and the said party of the second part shall and will, within a reasonable time hereafter, purchase and supply any deficiency of equipment or rolling-stock that may be required for use upon the said railroads, or either of them, and shall and will at all times, during the term of ninety-nine years aforesaid, keep the said railroads fully and adequately furnished with rolling-stock and equipment for the transportation over the same, and over any part thereof, of any and all passengers, baggage, freight, mail, express, and any and all other matter which shall or may be offered or required to be transported, at the rates fixed from time to time by the party of the second part, in conformity hereto, on said railroads, or over either or any part of either thereof, so that the said main line of railroad and the said Alton branch thereof shall be at all times during said term in the order and condition of a first-class railroad, so far as the rolling-stock and equipment thereof are concerned, and to that end the said party of the second part shall and will, from time to time, during the whole period aforesaid, at its own proper cost and expense, make or cause to be made any and all necessary repairs, replacements, renewals, construction and purchase of locomotives, tenders, passenger, baggage, and freight cars which shall or may be used upon said railroads, or required for the use of the same, and of any and all other rolling-stock and equipment which may be from time to time in general use upon first-class roads.

50 ARTICLE 5. The party of the second part, operating the said railroads during the term aforesaid, from time to time, have full authority to fix all rates for the transportation of passengers and freight upon the said main line of railroad and the said Alton branch thereof: Provided, however, and it is hereby expressly declared and agreed, That the rates on what is usually denominated through business shall be pro-rated according to mileage, after the usual customary terminal charges are deducted: Provided, That upon all such business destined to or from points east of Cleveland said leased line shall receive as much, pro-rated, according to mileage, as the line or lines east of Cleveland shall receive, and all joint business reaching either line at intermediate points from connecting roads, and upon which competitive rates are necessarily charged to secure the same, shall be treated as through business and pro-rated according to mileage. Upon all joint business, destined to or originating at local points on said leased lines, the usual customary local tariff rates shall be charged, except where the character of the business or the influence of competition shall make a less rate necessary to secure the same, in which cases the best rate attainable may be accepted, the intention being that, in the division of earnings from all joint business, the usual rate and method of division between connecting lines under different ownership shall

obtain, and the said second party shall draw to and transport upon said leased line all the business they, or either of them, can reasonably command or influence.

ARTICLE 6. The said party of the second part, keeping and performing all and singular the terms, provisions, and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect, and receive any and all fares, charges, freights, tolls, rents, revenues, issues, and profits of the said main line of railroad, extending from Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

ARTICLE 7. The said party of the second part shall, in each and every year of the term of ninety-nine years, pay or cause to be paid to the party of the first part, in the manner and at the times hereinafter provided, as rent reserved under this indenture, the sum of four hundred and fifty thousand ($450,000) dollars, until the gross earnings of the said railroad from Terre Haute to East St. Louis and the branch thereof to Alton for such year shall amount to the aggregate sum of one million seven hundred and fifty thousand ($1,750,000) dollars; and when such gross earnings for such year shall exceed the sum of $1.750,000 said second party shall pay to said first party in the manner hereinafter provided, as additional rent hereby reserved under this indenture, twenty per centum of the gross earnings for such year in excess of the sum of $1,750,000; and such sum of $450,000, and the said percentage of the gross earnings so reserved shall be paid over to said first party by said second party without any deduction, abatement, or diminution from any cause whatever; but it is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and it is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

The manner and times of the rent hereinbefore reserved shall be as follows: On the first day of December, one thousand eight hundred and eighty-two, and of every month in each year thereafter, shall be paid thirty-seven thousand and five hundred dollars, being one equal twelfth part of the minimum payment herein provided to be made for each and every year of the term aforesaid; and as soon as practicable after the first day of November of each and every year during the existence of this lease the gross earnings of said leased property for the year preceding shall be ascertained, and if such gross earnings shall exceed the sum of $1,750,000 for such year then, in addition to said aggregate payments of $450,000, the said second party shall pay to said first party, on or before the first day of January next following the said first day of November, a sum equal to twenty per centum of the gross earnings of said leased property in excess of $1,750,000 for the year ending October thirty-first of each and every year as above stated. All payments herein

required to be made to the party of the first part shall be made in the city of New York.

ARTICLE 8. The said party of the second part shall, at all times during the term aforesaid, bear, and at its own proper cost and expense pay and discharge, any and all costs, expenses, and charges whatsoever of operating and carrying on the business of said main line of railroad, and said Alton branch thereof, or either or any part of either of said railroads, or in any manner connected with, arising out of, or appertaining to the business, operation, or management of the same, and shall and will, at all times during said term, hold, save, and keep harmless and indemnify, the said party of the first part, of, from, and against any and all costs, charges, and expenses, suits, damages, and claims of any and every kind whatsoever arising out of or in any manner appertaining to or connected with the management or operation, during said term, of the said railroads, or either or any part of either thereof, including not only the expenses of
51 operating and carrying on the business of said roads, but also any and all claims for injuries to persons or property occurring on said road, or either or any part of either that may occur during said term; and any and all claims, suits, and demands for non-performance or breach of contract in respect to any person or thing to be transported over the same; and any and all claims and demands for the loss or destruction, by whatever cause, of any property whatsoever, while under the control of the party of the second part, or which it shall have undertaken to carry on or transport over any portion of said railroad.

ARTICLE 9. The said party of the second part, its successors and assigns, shall and will, at all times during the term aforesaid, pay, or cause to be paid, any and all taxes, assessments, and imposts, of whatever kind (except as hereinbefore provided), which have heretofore been, or which shall or may at any time during the continuance of this lease be, charged, levied, assessed, or imposed upon the said main line of said railroad and the said Alton branch thereof, or upon either, or any part of either, of said railroads or their appurtenances, or upon any business or transactions done upon them, or either of them, or upon any income arising therefrom, or upon any property whatsoever, the use of which during said term is hereby agreed to be furnished to the party of the second part, or which may be charged against or imposed upon the said party of the first part, its successors or assigns, for or on account of its or their ownership of the said railroads, or either or any part of either thereof, or of such property or any part thereof: Provided, however, That nothing in this contract contained shall be so construed as to render the party of the second part in any way liable for the tax specifically imposed upon the income of the holders of the bonds or stocks of the party of the first part.

ARTICLE 10. All business destined to the East, which may originate on the Belleville branch, or any extension thereof, shall, so far as it may be properly influenced by the said first party, be sent by the way of the aforesaid main line from East St. Louis to Terre Haute, and the said party of the second part hereby agrees that all

business passing West over the said main line of railroad, destined to points south of East St. Louis, shall, as far as can be so controlled, be sent over the Belleville branch and its connections.

ARTICLE 11. The party of the first part shall protect the party of the second part against all claims for right of way, and against all suits for injuries to persons or property arising prior to the first day of June, one thousand eight hundred and sixty-seven. Existing contracts and agreements entered into by the party of the first part in connection with said main line and Alton branch, or for business connected therewith, shall be assumed and performed and fulfilled by the party of the second part hereto in the same manner and to the same extent as the party of the first part would be bound to observe and fulfill the same, and the party of the first part shall be protected and indemnified from and against any claim for a breach of any of said contracts arising after the first day of June, one thousand eight hundred and sixty-seven, and the party of the second part shall protect the party of the first part against all claims or suits for injuries to persons or property, arising or growing out of the operation or management of said leased property by the Indianapolis and St. Louis Railroad Company, or any and all taxes levied or imposed subsequent to the first day of June, eighteen hundred and sixty-seven.

ARTICLE 12. The said party of the second part shall and will, during the whole period of ninety-nine years aforesaid, keep just, full, and true accounts of any and all business which shall or may be done upon the said main line of railroad and the said Alton branch thereof, or upon either or any part of either thereof, and of all moneys earned or received from or on account of such business, and shall render to the party of the first part monthly, during such period, a detailed approximate statement of such business, showing the receipts and disbursements on account thereof, and shall also, annually, to wit, on or before the first day of January in each year, account to and with the party of the first part for any and all moneys earned or received as aforesaid for and during the year terminating with the thirty-first day of October preceding the time of such accounting; and the president of the party of the first part, or an agent duly authorized by its board of directors, shall at all reasonable hours and times during the term of this lease have the right to examine and inspect, and there shall be produced and exhibited to him any and all books of account wherein shall be entered, or which shall purport to contain, any entry or statement relating to the business done on said main line and branch railroads, or on any part of either thereof, during the term aforesaid, and any and all vouchers relating to such business, and shall also have the right to take transcripts from, and copies of, such entries or statements and of such vouchers.

ARTICLE 13. In case the party of the second part shall make default in any payment in the manner and at the times herein provided of either or any part of the fixed minimum, or of any debit balance, ascertained at the end of any year, being part of the twenty per cent. of the gross earnings hereinbefore required to be

52 made to the party of the first part, or any portion thereof, at the time and in the manner herein required, and such default shall continue for thirty days, the party of the first part may, at its election, annul and vacate this contract by written notice to the party of the second part, and take summary possession of said leased roads, and all property connected therewith, necessary to the operation of the same, or may take such other or further action for the enforcement of the terms of this lease as it may deem advisable.

ARTICLE 14. The said party of the second part shall, at the end of such period of ninety-nine years, or other sooner termination of this contract, cease to operate said railroads, or either or any part of either of them, or to carry on the business of the same, and cease to demand, collect, or receive any tolls, rents, issues, or profits thereof, except such as may have been earned before the expiration of said term, and the said party of the first part shall and may resume the exclusive management and control of said railroads, and the business thereof.

ARTICLE 15. The said parties hereto shall and will, from time to time, and at all times hereafter, and as often as either of them shall be thereunto requested by the other, execute, deliver, and acknowledge any and all other instruments and assurances in the law, for the better and more effectually carrying out the object and intent of these presents, which counsel learned in the law shall reasonably advise, devise, or require, and which the said parties, by virtue of their present respective corporate powers and authorities, or of any powers or authorities hereafter to be acquired by either of them, at the time of the making of such request, lawfully may execute, deliver, and acknowledge.

ARTICLE 16. This contract shall become operative as of the first day of November, eighteen hundred and eighty-two; and it is mutually stipulated that neither this lease nor anything herein contained shall be so construed, used, or applied as to influence, affect, or prejudice the rights or obligations of either of the parties hereto in the pending claims, controversy, and litigation growing out of the former lease of said property by said first party to the Indianapolis and St. Louis Railroad Company, nor shall it operate to make said first party liable for any default or failure of said Indianapolis and St. Louis Railroad Company to perform its obligations under said former lease, nor shall it operate to affect in any way the rights or obligations of either of the parties hereto, under certain contracts guaranteeing the original lease.

In witness whereof, the said parties to these presents have caused their respective corporate seals to be hereto affixed, and the same to be attested by their respective presidents and secretaries, thereunto duly authorized by their respective boards of directors, the day and year first above written.

Executed in duplicate.

53 *Memorandum of Agreement Referred to in Accompanying Indenture of Lease.*

Memorandum of agreement this day made between J. H. Deve-

reux, representing the New York Central and Hudson River R. R. Co. (and pres't of the new lessee companies hereinafter named), and W. Bayard Cutting, pres't of the St. Louis, Alton, and Terre Haute R. R. Co., for the modification of the existing lease between the St. Louis, Alton and Terre Haute R. R. Co. and the Indianapolis and St. Louis R. R. Co., and with a view to a renewal of the same with the purchaser and successors of said last-named company, viz:

1st. Said lease shall be changed to run in the name of the Indianapolis and St. Louis Railway Co., and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Co., as lessees therein, their successors, grantees, or assigns, jointly and severally.

2. The rental reserved in said modified lease and paid by said new lessees shall, from and after the 1st day of November, 1882, be $450,000 per annum, until the gross earnings of said leased line, in any one year shall exceed $1,750,000, and then 20 per cent. of the gross earnings of said line in excess of $1,750,000 gross annual earnings, payments as provided in old lease, except the 20 per cent. earnings, shall not be paid until the end of the year in which it is earned.

3d. The lessee companies shall, with reasonable despatch and without unnecessary delay, put the leased line in the order and condition of a first-class single-track railroad as to road-bed, equipment, superstructure, and all necessary facilities and appointments requisite and necessary for the efficient and economic operation of the same; and it is here stipulated that the said improvements and additions shall include the completion of laying said leased line with steel rail and the ballasting of same with stone or gravel ballast, and that the same shall be thereafter maintained as provided in said original lease.

4th. Rates on what is usually denominated through business, or business passing over the entire length of both lessor and lessee lines, shall be pro-rated according to mileage after usual terminal charges are deducted: Provided, That upon all such business destined to or from points east of Cleveland the leased line shall receive as much *pro rata* for the transportation of said business as the line or lines east of Cleveland shall receive. This same principle or rule of division shall apply to traffic thrown upon either line at intermediate points from connecting roads, and destined to points beyond the line so receiving it, and upon which competitive rates are necessarily charged. Upon local business, or business destined to or originating at local points on said leased line, the usual local tariff rates shall be charged, except when the character of the business or the effect of competition shall make a less rate necessary and proper in view of the best interest of both lessor and lessee companies; and in such cases the best rates obtainable shall be accepted, the intention being that in the division of earnings from all joint business the usual method and rule of division of such earnings between connecting lines shall obtain in adjustment of accounts between lessor and lessee roads, and said lessee companies shall throw all the business over said leased lines they may or can reasonably command or influence.

5th. In addition to the present facilities for freight and passenger business (except coal), heretofore and now enjoyed by the lessor company at East St. Louis jointly with the lessee company, the said lessor company shall, without additional charge, have access to and the use of all the tracks of said lessee companies at East St. Louis to deliver and transfer by its own engines the business destined to or received from the Belleville branch or its extensions, and going to or from connections or terminal points at East St. Louis, and the facilities for the joint freight business upon the station grounds transferred to said lessee, and abutting on Front street in East St. Louis, shall be so enlarged and improved by said lessee company as to properly accommodate the terminal business of both companies (except the coal traffic of said lessor), in the most thorough, speedy, and economic manner; and in case a joint agency and division of expenses of the station, as heretofore, shall prove unsatisfactory to either party, at the election of such party separate agents shall be employed at separate expense, and if also required by such dissatisfied party, said depot or station grounds shall be divided, and in addition to the ground now occupied and used by said lessor company as a coal yard, there shall be set apart to the exclusive use of the lessor company a further strip of ground, at least two hundred feet in width, extending from Front street westward to Cahokia creek, after the same is filled up or raised to the grade of Front street. In the event of such separation of ground, said lessor company shall lay its own tracks and construct its own freight buildings thereon.

6th. It is mutually stipulated that the proposed modification of old or execution of a new lease shall not be used or resorted to
54 for the purpose of prejudicing or influencing the rights or status of either party hereto in the pending suit for rental under the old lease against the Indianapolis and St. Louis Railroad Company and its guarantors.

This agreement is made subject to the ratification of the same by the directors and stockholders of the companies, parties thereto, and each party shall be provided with certified copies of the action of the official meetings, pertaining thereto, of the other companies, parties hereto.

New York, November 17th, 1882.

W. BAYARD CUTTING.
J. H. DEVEREUX.

MONDAY, *June* 25, 1883.

Parties met pursuant to adjournment, same counsel present as on June 22, and the examination of H. T. Nash was continued by Mr. Butler, as follows:

Q. Have you made a statement showing the earnings, operating expenses, and net earnings of the St. Louis division of the leased line operated by the Indianapolis and St. Louis Railroad Company from June 1, 1867, the date of said lease, down to and including May 23, 1882; and, if so, will you make the same part of your answer to this question?

A. I have, and do herewith furnish a statement, and make the same part of my answer as Exhibit "K."

EXHIBIT "K."

Statement of Earnings and Operating Expenses I. & St. L. R. R., St. Louis Division, in years from 1867 to 1882.

	Earnings.	Operating Expenses including Interest and Taxes.	Net Earnings
1867—7 months	$1,181,816 68	$974,205 57	$207,611 11
1868	1,730,074 33	1,151,749 68	578,324 65
1869	1,774,867 46	1,066,982 11	707,885 35
1870	1,528,350 08	1,041,482 08	486,868 00
1871	1,378,698 74	892,155 34	486,543 40
1872	1,420,451 59	978,761 27	441,690 32
1873	1,368,652 57	985,664 91	382,987 66
1874	1,254,136 96	849,344 70	404,792 26
1875	1,102,957 16	816,914 99	286,042 17
1876	1,121,201 89	860,891 11	260,310 78
1877	1,065,279 94	775,821 50	289,458 44
1878	923,932 86	708,273 92	215,658 94
1879	1,033,900 60	737,020 58	296,880 02
1880	1,416,936 25	980,723 52	436,212 73
1881	1,346,276 66	1,305,508 08	40,768 58
1882 to May 23	457,351 61	688,603 00	231,251 39
	$20,104,885 38	$14,814,102 36	$5,290,783 02

"Exhibit K."

H. T. NASH,
Auditor, St. L., A. & T. H. R. R. Co.

June 25, 1883.

Q. Can you state why the operating expenses for the period from January 1, 1882, to May 23, 1882, appear so largely in excess of earnings as compared with other months, making a deficit of some $231,000.00?

A. Because there was charged in these expenses the final closing up of all expenses, including many that had accrued prior to that period.

Q. Then this $688,603 operating expenses charged up to the period from January 1, 1882, to May 23, 1882, is not wholly operating expenses of that period?

A. They are not.

Q. Part of it being operating expenses of former periods?

A. Yes, sir.

55 Q. Please look at Exhibit "D," filed with the intervening petition in this cause, and state whether or not the same is a true and correct account?

A. It is.

Q. Have you made up a statement showing the gross earnings of

the leased line during the months of July, August, and September, 1882, as shown by the statements rendered by the lessee company?

A. I have.

Q. Will you make such statement part of your answer to this question?

A. I will, and do herewith furnish a statement and make the same part of my answer as Exhibit "L."

EXHIBIT "L."

Statement of Gross Earnings of the St. Louis "Leased" Division of the Ind. & St. Louis Railroad for the Months of July, August, and September, 1882.

Earnings, July, 1882	$130,986 15
" August, 1882	166,637 01
" September, 1882	131,054 09
	$428,677 25

"Exhibit L."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 25, 1883.

Q. Have you made a statement showing the total amount paid to the St. Louis, Alton and Terre Haute Railroad Company by the receiver, under the order of court, on rentals accruing during the receivership while the road was being operated by the receiver?

A. I have.

Q. Will you make such statement part of your answer to this question?

A. I will, and do herewith furnish a statement, and make the same part of my answer as Exhibit "M."

EXHIBIT "M."

Statement of Payments made by J. H. Devereux, Receiver of Ind. & St. Louis Railroad Company, on account of Rent accrued during the following Months.

1882.

June 17.	On account	rent	May 23d to June 1st		$7,427 00
July 17.	"	"	for mo. of	June	27,405 28
Sept. 5.	"	"	"	"	2,319 55
Aug. 17.	"	"	"	July	36,554 26
Oct. 4.	"	"	"	"	2,741 56
Sept. 5.	"	"	"	Aug.	39,099 61
Oct. 4.	"	"	"	Sept.	38,688 12
					$154,235 38

"Exhibit M."

H. T. NASH,
Auditor St. L., A. & T. H. R. R. Co.

June 25, 1883.

GEORGE W. PARKER, being duly sworn, upon oath testifies as follows:

Interrogatories by Mr. BUTLER:

Q. Please state your name, residence, and occupation.

A. George W. Parker; St. Louis, Mo.; vice-president and general manager of the St. Louis, Alton & Terre Haute Railroad Co.

Q. How long have you been connected with the St. Louis, Alton & Terre Haute Railroad Co. in an official capacity?

A. Since 1863. I was either special or general counsel of
56 the company from 1863 to 1867 or '8, and from the latter date I have been acting as the managing officer of the company, being the vice-president, general manager, and treasurer.

Q. You may state whether the St. Louis, Alton and Terre Haute Railroad Company has controlled and operated, and still owns and operates, other lines of road besides the line leased to the Indianapolis & St. Louis Railroad.

A. Yes, sir; my company controls and operates a line of road extending southeast from East St. Louis, generally known as the St. Louis & Cairo Short Line. The leased line is generally known as the Main Line and Alton branch, and extends east from East St. Louis.

Q. Now, you may state, Mr. Parker, whether or not your company has paid any part of the capital stock taxes assessed for the years '73, '4, '5, and 6, in the State of Illinois. If so, explain fully what capital stock taxes have been paid by your company.

A. The so-called capital stock tax was assessed and distributed *pro rata* according to the length of line in the various counties through which the road ran, and my company paid the portion of the capital stock tax that was assessed against it in the various counties through which the road operated and controlled by it ran, and declined to pay that portion of the taxes assessed against the leased line in the counties through which it ran, except as to St. Clair county. By agreement with the lessee company, I did pay all of the capital stock tax assessed in St. Clair county as against both the leased line and the proprietary line—that is, the line retained and operated by my company.

Q. You speak of an agreement in the last answer. Please state with whom that agreement or understanding was had, and the character of the same.

A. That came about in this way: This capital stock tax was a new departure under the taxing system of Illinois, and was very little understood. The tax, I believe, was assessed against the St. Louis, Alton and Terre Haute Railroad Company by the State board, but in the distribution of the same through the various counties it was in some counties where the lease was understood, and the officers were familiar with the fact that the I. & S. L. had leased that portion of our line and were to pay the taxes thereon, distributed and extended said taxes against the Indianapolis and St. Louis Railroad Company. This created confusion, and some doubts arose as to whether the lessor or lessee company was liable. The subject was

under discussion between myself and the counsel and president of the Indianapolis and St. Louis Railroad Company for some time. Mr. E. W. Woodard, the then president of the Indianapolis and St. Louis Railroad Company, after considering the question for some time and taking counsel, finally agreed with me to assume all of these taxes assessed and extended against the property in the counties through which the leased line ran, provided I would assume and pay the taxes in St. Clair county, which were assessed as a whole against both the leased and proprietary lines, and in pursuance of that agreement I paid all of the capital stock taxes imposed against both the leased and retained roads in that county, and Mr. Woodard instructed Mr. Hanna, the then counsel for the Indianapolis and St. Louis Railroad Company, to take charge of the taxes assessed in the other counties through which the leased line ran, which he did.

Q. You may state whether the Indianapolis and St. Louis Railroad Company engaged in litigation with reference to this capital stock tax mentioned by you at the close of your last answer, and if so, in what courts that litigation was had.

A. Yes, sir; instead of adopting the policy which I thought best, and acted upon, of paying the capital stock tax, in so far as it applied to my line of road, Mr. Hanna, in so far as it applied
57 to the leased line of road, commenced litigating the same. Mr. Hanna, although assuming the burden of the tax as between our respective companies, litigated the right of the taxing power of the State to impose this tax, first in the State, and next in the United States courts, which litigation, as I now remember it, culminated in what is called the Vance case in the Supreme Court of the United States, by a decision adverse to the Indianapolis and St. Louis Railroad Company, and I understand the same question has been again prosecuted in the State court, and a similar decision rendered in the supreme court of the State of Illinois.

Q. You may state whether or not, at the time these capital stock taxes were levied and assessed and extended, the St. Louis, Alton & Terre Haute Railroad Company owned any stocks or bonds, either issued by itself or by any other corporation or person.

A. It did not. Its ownership was confined to the tangible property represented in the lease to the Indianapolis & St. Louis Railroad Company, and in the road controlled and operated by the St. L., A. & T. H. R. R. Company at that time.

Q. The receiver, in his answer filed in this cause, claims that there is due from the St. Louis, Alton and Terre Haute Railroad Company to the receivership an amount of money, for charges growing out of expenses at East St. Louis, for which the Indianapolis and St. Louis Railroad Company has received no credit. Please state the facts relative to any such charges, and whether any such charges remain unpaid by your company, and if so, to what date they are properly to be credited.

A. The account of nine thousand and odd dollars preferred against us, as unpaid East St. Louis expenses, originated in this way: We jointly occupied the same freight depot at East St. Louis under an agreement to pay to the Indianapolis and St. Louis com-

pany, by which the depot and yard is managed and run and held under the lease, a certain percentage of the expenses in proportion to the tonnage handled by the respective companies. These expenses, like the rental money, were paid from month to month. After the Indianapolis and St. Louis Railroad Company ceased paying rental, in the spring of 1878, my company was necessarily compelled to cease paying that company these monthly expenses. We were hard pressed pecuniarily on account of the rental default of the Indianapolis and St. Louis Railroad Company, and necessarily had to husband our resources to prevent bankruptcy, and this account was permitted to run along in that way, and for that reason. The account accrued exclusively during the months that the lessee company refused to pay any rental, and these expense payments were resumed when the court forced the I. & St. L. to resume the partial payment of rental. No part of this claim or demand against our company accrued during the receivership.

Cross-examination by JOHN T. DYE, Esq.:

Q. Will you give the names of the counties in which you paid the capital stock taxes assessed against the St. Louis, Alton & Terre Haute Railroad Company?

A. St. Clair, Randolph, Perry, and Washington.

Q. Will you state how much capital stock tax you paid in St. Clair county?

A. I do not remember the exact amount. It was several hundred dollars.

Q. Will you furnish a schedule or statement showing the amounts which you paid in the various counties of the tax assessed against the capital stock of the St. Louis, Alton and Terre Haute Railroad Company?

A. I will have a statement made up and furnished to you.

Q. Did the St. Louis, Alton and Terre Haute railroad extend any further than Belleville, Illinois? Was not the line of road running in a southeasterly direction from Belleville another and different corporation from the St. Louis, Alton and Terre Haute Railroad Company?

58

A. Yes, sir; the portion of the St. Louis, Alton and Terre Haute railroad retained and operated by the company consisted of what is known as the Belleville branch, extending from the junction at East St. Louis to Belleville, and the line extending southeast from Belleville was and is a leased line—the Belleville and Southern Illinois railroad.

Q. Then you paid no taxes on the capital stock of the St. Louis, Alton and Terre Haute railroad in any county besides St. Clair county, did you?

A. I paid capital stock taxes in all of the counties named. Cannot say definitely whether the extension of this tax was made against the St. Louis, Alton and Terre Haute railroad or the Belleville and the Southern Illinois, but my impression is that the extension was made all the way through, in the counties named,

against the St. Louis, Alton and Terre Haute Railroad Company. I will ascertain and make the statement referred to above disclose the answer to your question.

Q. In your answer to the first question you say, by agreement with the lessee company, you did pay all the capital stock taxes assessed in St. Clair county against both the leased line and proprietary line. Do you mean to be understood that any assessment was made against the capital stock of the leased line in the State of Illinois? Was not the assessment made upon the capital stock of the St. Louis, Alton and Terre Haute Railroad Company?

A. My understanding or recollection is, that the assessment was made against the road; that these so-called capital stock assessments were really made against the property of the company in the counties through which the road ran, but I do not remember just how it did appear on the books.

Q. You know, do you not, that the assessment of the capital stock was made by the State Board of Equalization?

A. Yes, sir.

Q. And that it was made as one assessment of the whole capital stock of the St. Louis, Alton and Terre Haute Railroad Company?

A. Yes, sir; I know that is what they called the tax.

Q. You know, do you not, that there was an assessment of the tangible property that was leased to the Indianapolis and St. Louis Railroad Company, in addition to this capital stock of the St. Louis, Alton and Terre Haute Railroad Company, which you say was assessed by the State board?

A. Yes, sir; I know that there was an assessment of the tangible property, and that this capital stock tax movement was, in fact, simply a method of increasing the assessment of the tangible property of the companies, including the franchise rights. That was the practical end desired to be attained, and that was attained by the State board.

Q. When you say the tax in St. Clair county was assessed as a whole against both the leased and proprietary lines, do you mean to be understood that any assessment was made of the capital stock of the Indianapolis and St. Louis Railroad Company by the State Board of Equalization in Illinois?

A. I mean to say that the tax in this county was imposed in gross against the roads of the St. Louis, Alton and Terre Haute Railroad Company, part of which was leased, and part retained and controlled by my company. Under the lease to the Indianapolis and St. Louis Railroad Company the lessee agreed to pay the taxes imposed against the lessor on account of the leased line, whether the same was imposed in the name of the lessor or the lessee company, and it was under this clause in the lease that the discussion arose between the president of the lessee company and myself, representing the lessor company.

Q. The agreement that you speak of is the 10th article of lease or operating contract, is it not?

A. Yes, sir.

59 Q. Is there any other agreement besides that?
A. None other in the lease that I remember.

Rebuttal by Mr. BUTLER:

Q. I will ask you, Mr. Parker, if the extension of the capital stock taxes upon the duplicates of the various counties, which makes the actual levy of the taxes, was not made by the county officials along the line of the various roads in the State of Illinois?

A. They were, or should have been.

Statement of Liabilities of the Indianapolis and St. Louis Railroad Company, September 30, 1882.

Bonded debt.

First mortgage bonds dated July 1, 1869, fifty years, at 7 per cent	$2,000,000	
Interest unpaid	178,395	
		$2,178,395
Second mortgage bonds, dated October 1, 1870, thirty years, at 7 per cent. Amount outstanding	$906,000	
Interest unpaid	285,390	
		$1,191,390
Second mortgage bonds (as above) in sinking fund	$94,000	
Interest unpaid	29,610	
		$123,610
Equipment bonds, dated July 1, 1871, ten years, at 8 per cent.	$500,000	
Interest unpaid	187,600	
		$687,600

Summary.

First mortgage	$2,178,395	
Second mortgage	1,191,390	
Equipment mortgage	687,600	
		$4,057,385

Due on second and equipment mortgage, $1,878,990.

Indebtedness Accrued Subsequently to November 23, 1881, *and Prior to May* 24, 1882.

Due sundry persons and railroad companies for supplies, overclaims, etc., as per detailed statement No. 1	$226,949 70
Due, as above, audited subsequent to September 30, 1882, as per detailed statement No. 2	9,886 73
Due other railroads on ticket, freight, and mileage balances, as per detailed statement No 3	8,613 79
Due Cleveland Rolling Mill	103,922 75
Due Cleveland, Columbus, Cincinnati and Indianapolis Railway Company for advances	125,000 00
Due St. Louis, Alton and Terre Haute Railroad Company, unpaid rental	7,727 26
Total	$482,100 23

Indebtedness Accrued Prior to November 24, 1881.

Due sundry persons, as per detailed statement, No. 1, already referred to		$57,148 36
Due Pennsylvania Company for advances		583,585 12
Due Cleveland, Columbus, Cincinnati and Indianapolis Railway Company for advances		873,585 12
Due railroad companies—parties to lease of St. L., A. & T. H. R. R.—Sept. 11, 1867, for advances under article 2 of contract for their proportion of improvements and equipment, in addition to operating expenses:		
P., H. W. & C. R'y	$94,916 66	
I., C. & L. R. R.	94,916 66	
C., C., C. & I. R'y	73,998 40	
C., P. & A. R. R.	20,918 28	
		284,750 00
60 Due St. Louis, Alton and Terre Haute R. R. Co. for rental, under lease of Sept. 11, 1867, evidenced by bills payable		75,918 72
Due St. Louis, Alton and Terre Haute R. R. Co. for rental, under lease of Sept. 11, 1867, for which no notes have been given, exclusive of interest		450,200 69
		$2,325,188 01
Capital stock, paid up and issued		$600,000 00

SUMMARY

First mortgage bonds and interest	$2,178,395 00
Second mortgage and equipment mortgage bonds and interest	1,878,990 00
Indebtedness subsequent to Nov. 23, 1881, and prior to May 24, 1882, unsecured	482,100 23
Indebtedness prior to Nov. 23, 1881, unsecured	2,325,188 01
Total indebtedness	$6,864,673 24

STATE OF INDIANA, *Marion County*

Russell Elliott, being first duly sworn, on oath says, that he is the auditor of the Indianapolis and St. Louis Railroad Company, and that the above and foregoing is a full, true, complete, and correct statement of the liabilities of the said railroad company on the 30th day of September, 1882, as the same appears on the books of said company, and to the best of his knowledge and belief.

RUSSELL ELLIOTT.

Subscribed and sworn to before me, this twenty-first (21st) day of November, A. D. 1882.

JOSEPH M. KEATINGE,
Notary Public, M. Co., Ind.

WILLIAM P. FISHBACK,
Master.

Statement of Receipts by Receiver of Indianapolis and St. Louis Railroad Company, from Earnings and other Sources, prior to May 24, 1882.

INDIANAPOLIS, *June* 27, 1883.

JOHN T. DYE, Esq.,
General Attorney I. & St. L. Ry., City.

DEAR SIR: As per request of John M. Butler, Esq., attorney, I give below the amount received by J. H. Devereux, receiver, from earnings and other sources which accrued prior to May 24, 1882, viz: $182,587.58.

Yours resp'y,
P. A. HEWITT,
Acting Auditor.

61 INDIANAPOLIS & ST. LOUIS RAILWAY, LEGAL DEPARTMENT,
INDIANAPOLIS, IND., *July* 16, 1884.

JOHN M. BUTLER.

DEAR SIR: The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company holds Indianapolis and St. Louis R. R. Co.'s bonds, as follows:

"Second Mortgage"---------- 893
"Equipment Bonds"---------- 498

Very truly,
JNO. T. DYE.

It is agreed that the above statement may be used as evidence, on appeal in the matter of the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company *vs.* J. H. Devereux, rec'r, and Indianapolis & St. Louis Railroad Co., in cause of H. B. Hurlbut, trustee, *vs.* I. & St. L. R. R. Co., No. 7257, U. S. c't c't, dist. of Indiana.

JNO. T. DYE,
Of Council for C., C., C. & I. R'y Co.

62 *Stipulation. Filed July* 18, 1884.

INDIANAPOLIS & ST. LOUIS RAILWAY, LEGAL DEPARTMENT,
INDIANAPOLIS, IND., *July* 16, 1884.

JOHN M. BUTLER.

DEAR SIR: The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company holds Indianapolis and St. Louis R. R. Co.'s bonds, as follows:

"Second Mortgage"---------- 893
"Equipment Bonds"---------- 498

Very truly,
JNO. T. DYE.

It is agreed that the above statement may be used as evidence, on appeal in the matter of the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company *vs.* J. H. Devereux, rec'r, and Indianapolis—St. Louis Railroad Co., in cause of H. B. Hurlbut, trustee, *vs.* I. & St. L. R. R. Co., No. 7257, U. S. c't c't, dist. of Indiana.

JNO. T. DYE,
Of Counsel for C., C., C. & I. R'y Co.

63 *Evidence in Behalf of Respondents.*

The deposition of P. A. Hewitt, a witness of lawful age, produced on behalf of respondents before me, Joseph M. Keatinge, notary public within and for Marion county and State of Indiana, at the law offices of John T. Dye and of McDonald, Butler and Mason, in the city of Indianapolis, county and State aforesaid, on the 12th and 13th days of July, 1883, in the matter of the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed in a cause pending in the circuit court of the United States for the district of Indiana, wherein Hinman B. Hurlbut, trustee, etc., is complainant, and the Indianapolis and St. Louis Railroad Company is defendant, being No. 7418 on the docket of said court.

Appearances: On behalf of petitioner, John M. Butler, Esq., of counsel; on behalf of respondents, John T. Dye, Esq., of counsel.

OFFICE OF JOHN T. DYE,
July 12, 1883, 10 *o'clock A. M.*

P. A. HEWITT, a witness of lawful age, examined on behalf of the respondents, being first duly sworn, testified as follows:

Direct examination by JOHN T. DYE:

Q. Please state your name.

A. P. A. Hewitt.

Q. What is your business?

A. Auditor of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company.

Q. State whether you are familiar with the books and accounts of the Indianapolis and St. Louis Railroad Company.

A. Yes, sir; I am.

Q. State if you are able, after an examination of those books and accounts, to furnish a statement of the earnings and expenses of the St. Louis, Alton and Terre Haute railroad from November 24, 1881, to May 23, 1882, inclusive; and, if so, make such statement a part of your answer to this question, and mark the same "Exhibit O."

A. I have made such an examination, and now furnish such statement, and make the same part of this answer as "Exhibit O."

Said statement, produced by the witness and marked "Exhibit O," being in words and figures as follows:

"EXHIBIT O."

Statement of Earnings and Expenses of the St. Louis, Alton and Terre Haute Railroad from November 24th, to May 23d, inclusive.

Gross Earnings.	Operating Expenses, including Taxes.	Deficit.
$578,195 28	$848,631 20	$270,435 92

Correct:

P. A. HEWITT,
Acting Auditor.

Q. State if you have been and are acting as auditor for J. H. Devereux, receiver of the Indianapolis and St. Louis railroad, and whether or not you are familiar with his accounts.

A. I have been acting as auditor for J. H. Devereux, receiver, and am familiar with his accounts.

Q. Will you furnish a list of the disbursements made by
64 the receiver on account of the indebtedness of the Indianapolis and St. Louis Railroad Company for labor, materials, and rental to the St. Louis, Alton and Terre Haute Railroad Company, and other accounts accruing prior to the appointment of the receiver?

A. I herewith furnish such a list, and make the same part of this answer, and mark the same "Exhibit P;" showing an excess of disbursements on account of the Indianapolis and St. Louis railroad of one hundred and twenty thousand one hundred and seventy dollars and twenty-four cents ($120,170.24).

"Exhibit P" produced by the witness being in words and figures as follows:

"EXHIBIT P."

Statement of Disbursements by J. H. Devereux, Receiver, on Account of the Indebtedness of the I. & St. L. R. R. Co.

DISBURSEMENTS.

Amount paid St. L., A. & T. H. R. R. Co., rental	$23,221 87	
Amount paid bills payable	18,442 50	
" " foreign railroads	15,349 94	
" " interest 1st mortgage bonds	11,585 00	
" " accounts payable	223,667 46	
" " station agents	8,265 46	
Miscellaneous earnings St. L. Div.	23 36	
" " Ind. "	8 90	
Freight earnings Ind. Div.	156 93	
Conducting trans. St. Louis Div.	1,868 51	
" " Ind. Div.	3 01	
Drawbacks	1 94	
Miscellaneous accounts	187 94	
Total disbursements		$302,782 82
Excess of disbursements over receipts of I. & St. L. R. R. prior to receivership		$120,170 24

Correct:

P. A. HEWITT,
Acting Auditor.

Q. Will you make a correct statement showing the earnings, operating expenses (including taxes), and net earnings of the St. Louis, Alton and Terre Haute railroad, and rental paid to the St. Louis, Alton and Terre Haute Railroad Company for each year, from the year 1867 to May 23, 1882?

A. I herewith furnish such statement and make the same a part of this answer, and mark it "Exhibit Q."

"Exhibit Q" produced by the witness being in words and figures as follows:

Statement of Earnings, Expenses, Rental, Etc., of the St. L., A. & T. H. R. R. for the Years 1867 to 1882.

Years.	Earnings.	Operating expenses including taxes.	Net earnings.	Rental paid.	Balance.	Deficit.
1867—7 months	$1,181,816 68	$974,205 57	$207,611 11	$354,545 00		$146,933 89
1868	1,730,074 33	1,151,749 68	578,324 65	519,022 30	$59,302 35	
1869	1,774,867 46	1,066,982 11	707,885 35	532,460 20	175,425 15	
1870	1,528,350 08	1,041,482 08	486,868 00	458,505 02	28,362 98	
1871	1,878,698 74	892,155 34	486,543 40	450,000 00	36,543 40	
1872	1,420,451 59	978,761 27	441,690 32	450,000 00		8,309 68
1873	1,368,652 57	985,664 91	382,987 66	450,000 00		67,012 34
1874	1,254,136 96	849,344 70	404,792 26	450,000 00		45,207 74
1875	1,102,957 16	816,914 99	286,042 17	450,000 00		163,957 83
1876	1,121,201 89	860,891 11	260,310 78	450,000 00		189,689 22
1877	1,065,279 94	775,821 50	289,458 44	450,000 00		160,541 56
1878	923,932 86	708,273 92	215,658 94	141,155 11	74,503 83	
1879	1,033,900 60	737,020 58	296,880 02	300,778 10		3,898 08
1880	1,416,986 25	980,723 52	436,212 78	422,283 06	13,929 67	
1881	1,346,276 66	1,305,508 08	40,768 58	405,656 07		364,887 49
1882 to May 23	457,351 61	688,603 00	*231,251 39	180,464 33		411,715 72
Totals	$20,104,885 38	$14,814,102 36	$5,290,783 02	$6,464,869 19	$388,067 38	$1,562,153 55

Correct: P. A. HEWITT, *Actng Auditor.* *Deficit. [Deficit $1,174,086 17

Q. Will you furnish a statement showing the earnings, operating expenses (including taxes), and net earnings of the St. Louis, Alton and Terre Haute railroad, and rental paid to the St. Louis, Alton and Terre Haute Railroad Company by the Indianapolis and St. Louis Railroad Company, from the first day of January, 1878, to the twenty-third day of May, 1882?

A. I hereby furnish such statement, and make it a part of this answer, and mark the same "Exhibit R."

"Exhibit R" produced by the witness being in words and figures as follows:

EXHIBIT "R."

Statement of Earnings, Expenses, Rental, and Interest on Bonds of the Indianapolis and St. Louis R. R. Co., both Divisions.

Years.	Earnings.	Operating Expenses including taxes.	Net earnings.	Rental paid.	Interest on bonds paid.	Balance.	Deficit.
1878	$1,842,875 97	$1,033,842 75	$809,033 22	$141,155 11	$154,595 00	$13,283 11	
1879	1,493,877 57	1,002,727 95	491,149 62	300,778 10	109,200 00	81,171 52	
1880	2,009,620 13	1,401,106 75	608,513 38	422,283 06	109,200 00	77,030 32	
1881	1,948,652 18	1,864,515 18	84,137 00	405,656 07	109,200 00		$430,719 07
1882 to May 23	649,368 58	952,126 90	*302,758 32	180,464 33	7,910 00		491,132 65
Totals	$7,443,894 43	$6,253,819 53	$1,190,074 90	$1,450,336 67	$490,105 00	$171,484 95	$921,851 72

* Deficit. [Balance deficit $750,366 77

Rental Paid to St. L., A. & T. H. R. R. Co.

From January 1, 1878, to May 23, 1882 $1,450,336 67
Amount of net earnings for same period 1,190 074 90

Amount of rental paid in excess of net earnings $260,261 77

Correct: P. A. HEWITT, *Acting Auditor.*

66 Q. Will you furnish a statement of the earnings, expenses, net earnings, rental paid, and amount of interest paid on bonds of the Indianapolis and St. Louis Railroad Company, both divisions, from the year 1867 to May 23, 1882, and make the same a part of your answer to the question?

A. I do herewith furnish such statement, and make this same part of this answer, and mark the same "Exhibit S."

"Exhibit S" produced by the witness being in words and figures as follows:

"EXHIBIT S."

Statement of Earnings, Expenses, Rental, and Interest on Bonds of the Indianapolis and St. Louis R. R. Co., both Divisions.

Year.	Earnings.	Operating expenses including taxes.	Net earnings.	Rental paid.	Interest on bonds paid.	Balance.	Deficit.
1867—7 months	$1,181,816 68	$974,205 57	$207,611 11	$354,545 00			$146,933 89
1868	1,730,074 33	1,151,749 68	578,324 65	519,022 30		$59,302 35	
1869	1,774,867 46	1,066,982 11	707,885 35	532,460 20		175,425 15	
Ind. Div.—6 months.							
1870	1,795,347 67	1,183,214 01	612,133 66	458,505 02	$65,481 62	88,147 02	
1871	2,050,255 46	1,277,297 35	772,958 11	450,000 00	208,305 00	114,653 11	
1872	2,110,681 07	1,382,672 16	728,008 91	450,000 00	237,000 00	41,008 91	
1873	2,100,067 45	1,413,238 96	686,828 49	450,000 00	238,570 00		1,741 51
1874	1,868,463 23	1,285,126 22	633,337 01	450,000 00	247,525 00		64,187 99
1875	1,629,384 55	1,187,884 93	441,499 62	450,000 00	250,000 00		258,500 38
1876	1,642,339 51	1,226,217 84	416,121 67	450,000 00	250,000 00		283,878 33
1877	1,541,060 47	1,064,669 90	476,390 57	450,000 00	247,410 00		221,019 43
1878	1,342,375 97	1,033,342 75	309,033 22	141,155 11	154,595 00	13,283 11	
1879	1,498,877 57	1,002,727 95	49,149 62	300,778 10	109,200 00	81,171 52	
1880	2,009,620 13	1,401,106 75	608,513 38	422,288 06	109,200 00	77,080 32	
1881	1,948,652 18	1,864,515 18	84,137 00	405,656 07	109,200 00		430,719 07
1882 to May 23	649,368 58	952,126 90	*302,758 32	180,464 33	7,910 00		491,132 65
Totals	$26,868,252 31	$19,417,078 26	$7,451,174 05	$6,464,869 19	$2,284,396 62	$650,021 49	$1,898,118 25

Correct: P. A. HEWITT, *Acting Auditor.*

*Deficit.

[Deficit $1,248,091 76

Q. Will you please furnish a statement showing the earnings, operating expenses, including taxes, and net earnings of the St. Louis, Alton and Terre Haute railroad for the years 1878 to May 23, 1882, inclusive, and also the rental paid to the St. Louis, Alton and Terre Haute Railroad Company for those years?

A. I herewith furnish such a statement, and make it a part of this answer, and mark it "Exhibit T."

"Exhibit T" produced by the witness being in words and figures as follows:

"EXHIBIT T."

Statement of Earnings, Expenses, Rental, etc., of the St. L., A. & T. H. R. R. for the Years 1878 *to* 1882.

Years.	Earnings.	Operating expenses including taxes.	Net earnings.	Rental paid.	Balance.	Deficit.
1878	$923,932 86	$708,273 92	$215,658 94	$141,155 11	$74,503 83	
1879	1,033,900 60	787,020 58	296,880 02	300,778 10		$3,898 08
1880	1,416,936 25	980,723 52	436,212 73	422,283 06	13,929 67	
1881	1,346,276 66	1,305,508 08	40,768 58	405,656 07		364,887 49
1882 to May 23	457,351 61	688,603 00	*281,251 89	180,464 33		411,715 72
Totals	$5,178,397 98	$4,420,129 10	$758,268 88	$1,450,336 67	$88,433 50	$780,501 29

*Deficit. [Total deficit $692,067 79

Rental Paid St. L., A. & T. H. R. R. Co.

From January 1, 1878, to May 23, 1882 $1,450,336 67
Amount of net earnings for same period 758,268 88

Amount of rental paid in excess of net earnings $692,067 79

Correct: P. A. HEWITT, *Acting Auditor.*

67 Thereupon the further taking of the deposition of said witness was continued until 3.30 o'clock, p. m., of said day, for the purpose of the cross-examination of said witness by counsel for petitioner.

3.30 o'clock p. m.
OFFICE OF MCDONALD, BUTLER & MASON.

Cross-examination by JOHN M. BUTLER, Esq.:

Q. In making up your "Exhibit S," which you have made a part of your direct examination, state whether or not you have included in the operating expenses charged up from 1867 to the time that the Indianapolis and St. Louis railroad was opened for business in 1870 the two hundred and eighty-four thousand dollars, set forth in the schedule filed by Mr. Fishback, as advances made by the companies signing the first guaranty contract. There is the two hundred and eighty-four thousand dollars in Fishback's schedule. Now what I want to know is, is that figured into any of those figures in "Exhibit S," for 1867, 1868, 1869, or 1870?

A. No, sir.

Q. It is not?

A. No, sir.

Q. Have any deductions from operating expenses been made on account of that two hundred and eighty-four thousand dollars, shown in Fishback's report?

A. No, sir; that was a charge against construction.

Q. It is neither charged into the operating expenses here, nor are the operating expenses reduced by reason of it?

A. No, sir.

Q. Mr. Hewitt, if no interest on Indianapolis and St. Louis bonds had been paid out of earnings of the entire line during the lease, I will ask you if your "Exhibit S" does not show that there were earnings sufficient to have paid all the rental that has been paid, besides paying all the operating expenses, including taxes, and have left a surplus of earnings of nine hundred and eighty-six thousand three hundred and four dollars and eighty-six cents?

A. Yes, sir.

Q. On your "Exhibit S" you have charged up against the earnings of the entire line all operating expenses of the entire line, including taxes, and also all the interest that has ever been paid, down to the time of the receivership, upon Indianapolis and St. Louis railroad bonds, have you not?

A. Yes, sir.

Q. And in that way, by charging against gross earnings all operating expenses, all rental paid, and all interest ever paid on the bonds of the Indianapolis and St. Louis Railroad Company, you bring out a deficiency of one million two hundred and forty-eight thousand ninety-one dollars and seventy-six cents?

A. Yes, sir.

Q. That is to say, that if the operating expenses, as charged clear down to May 23, 1882, had been actually paid, and all rental that

has ever been paid were added to the operating expenses, and all interest that has ever been paid, down to the date of the receivership, were added to that result, even then the gross earnings would pay it all, lacking only this deficiency of $1,248,091.76.

A. Yes, sir.

Q. I will ask you to state, Mr. Hewitt, if in the column of "Exhibit S," showing "gross earnings," you have included anywhere the three hundred twenty-two thousand three hundred ninety-
68 six dollars and seventy-seven cents, paid to the Indianapolis and St. Louis Railroad Company as the result of the pool contracts existing between 1875 and 1879, inclusive?

A. I do not know whether the figures named are the correct figures or not, but all pool balances entered into the earnings.

Q. Well, then, are all pool balances set forth in the column headed "Gross Earnings" on "Exhibit Q"?

A. Yes, sir.

Q. I will ask you if all these pool earnings were not credited to the Indianapolis and St. Louis railroad exclusively, and no part of them to the St. Louis, Alton and Terre Haute railroad?

A. No, sir; they were not all credited to the Indianapolis and St. Louis railroad.

Q. Do you mean to say that the St. Louis, Alton and Terre Haute has received any credit for any part of the pool earnings?

A. Yes, sir.

Q. When did they receive it?

A. I cannot say without examining the books for the date. The credits would be in the year in which the earnings were made.

Q. You know that the pool balances were credited to the St. Louis, Alton and Terre Haute railroad?

A. Yes, sir.

Q. And that the percentages were paid on pool balances just as much as on any other earnings of the St. Louis, Alton and Terre Haute?

A. Well, during the time you mention they were paying full rental.

Q. You have examined that, so that you know you are right about it?

A. Yes, sir.

Q. You know that the pool balances, during the existence of this lease, whenever they have accrued, have been credited not exclusively to the Indianapolis and St. Louis railroad, but to the St. Louis, Alton and Terre Haute railroad, when they should have been credited there?

A. Yes, sir; in these statements.

Q. What statements have you reference to?

A. To "Exhibit S" and "Exhibit T," produced on my direct examination.

Q. Now, returning to "Exhibit S," I want to ask if you intend to have it understood that all of the operating expenses charged in that exhibit, down to May 23, 1882, have been actually paid out of the earnings against which they are charged?

A. Probably not.

Q. Why?

A. There are some debts still due, which occurred prior to the receivership. The unpaid vouchers cover both charges to operating expenses and charges against construction. There may be a part of the operating expenses charged against the earnings the vouchers for which are still unpaid. I know of no operating expenses remaining unpaid, except the claims reported by the master to be due, part of which have since been paid.

Q. What became of the money if these debts are not paid? If these operating expenses were not paid out of the earnings against which they are charged, what became of the money?

A. The statement shows what became of the money.

Q. Does this statement show what became of the money that was not paid out where you have booked it up here as paid?

A. No, sir.

69 Q. Then, if there are two hundred and twenty-six thousand dollars of these operating expenses on "Exhibit S" still remaining unpaid, I want to know what became of the money, the gross earnings that ought to have paid them, and which you booked here as though it had paid them?

A. The statement shows a deficit of one million two hundred forty-eight thousand ninety-one dollars and seventy-six cents which, after deducting the amount you name, would still leave a deficit of about one million dollars.

Q. Does not this statement show that the gross earnings were large enough to have paid all tho operating expenses and have left six million dollars?

A. A part of that has gone to interest.

Q. Do you intend to state that it was applied on interest?

A. Yes, sir; a part of the net earnings were applied on interest.

Q. I will ask you if there are any net earnings in any road until all operating expenses are paid?

A. No, sir.

Q. I want to ask you, Mr. Hewitt, how it came that in 1882, for less than five months time, you have charged against gross earnings, for operating expenses of two hundred and sixty-four miles of road nine hundred and fifty-two thousand one hundred and twenty-six dollars ninety cents?

A. The charges were made from the bills that were rendered.

Q. You mean to say that is a correct and accurate statement?

A. Yes, sir; the bills rendered may have included charges for month previous, which would then have been charged up in those five months.

Q. Do you not see by reference to the statement that you have charged up for these five months almost as much as for many of the entire years before that time?

A. Yes, sir; large improvements were being made to the property during these months.

70 Q. And were not these improvements being made on the Indianapolis and St. Louis Railroad?

A. Not exclusively.

Q. I did not ask you that. I am asking if there were not large improvements being made, during the year 1882, on the Indianapolis and St. Louis railroad?

A. I think there were.

Q. I will ask you now if that charge to operating expenses does not include a vast amount of improvements instead of operating expenses?

A. They are termed "operating expenses," unless they are new work, or what we term "additions to the property."

Q. You have just said that there were vast improvements being made to the property outside of ordinary improvements?

A. I did not say so.

Q. Well, did you not mean that?

A. I understand that the property had gone down and they were bettering it.

Q. I will ask you if these changes for the five months just before the receivership do not average on the whole line, operating expenses, at something over eight thousand five hundred dollars per mile per year?

A. I think it would be about that amount.

Q. I will ask you if these excessive operating expenses are not limited to the years 1881 and 1882, as shown by your "Exhibit S"?

A. They may be some larger than for previous years.

Q. Are they not about a half a million dollars larger?

A. The statement shows.

Q. Now, I will ask you if, at the very time that these operating expenses were being charged, in the year 1882, the leased line was not making gross earnings at the rate of over one million, five hundred thousand dollars a year?

A. "Exhibit Q" shows the earnings for the first four months and twenty-three days to be four hundred fifty-seven thousand, three hundred fifty-one dollars, sixty-one cents. At that rate the year's earnings would be about one million, one hundred thousand dollars.

Q. Now, turn to "Exhibit P." I want to ask you whether or not you mean here to show an excess of disbursements over receipts of one hundred thirty thousand one hundred seventy dollars twenty-four cents—an excess of disbursements over receipts received from earnings earned by the Indianapolis and St. Louis Railroad prior to the receivership?

A. Yes, sir.

Q. Now, Exhibits "R" and "T," as put in evidence by you, are simply quotations from Exhibits "Q" and "S," respectively, beginning with the year 1878, are they not?

A. They are a part of those statements. Yes, sir.

Q. Including only from the year 1878, down?

A. Yes, sir; beginning with the year 1878.

Q. I will ask you if the indebtedness of the Indianapolis and St. Louis railroad to the St. Louis, Alton and Terre Haute Railroad

Company on account of rental did not begin to accrue on the first day of April?

A. I understand so.

Q. Therefore, in order to get at the operations of the leased line of the Indianapolis and St. Louis simply and exclusively, at the date of indebtedness to the St. Louis, Alton and Terre Haute Railroad Company began to accrue, you would have to divide the operations of the year at April first, would you not?

A. Yes, sir.

Q. That is not done on the exhibit?

A. No, sir.

71 Q. The mere aliquot parts of the year 1878 apportioned to the months would not be a true exhibit?

A. No, sir.

Q. Because earnings vary——

A. I can give the exact amounts.

Q. How long have you been connected with the Indianapolis and St. Louis railroad and the receivership as auditor?

A. As auditor of the Indianapolis and St. Louis Railway Company since October 1, 1882.

Q. Prior to that how long have you been connected with the Indianapolis and St. Louis railroad property?

A. I was not connected with it before that; I was acquainted somewhat with its operations as auditor of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, but I never had anything to do with its accounts, except when I was down here last year making up some statements for Mr. Devereux.

Q. Then you were not connected with it before October first, except while you were making those statements?

A. No, sir.

Q. In making those statements did you inform yourself as to the relative local and foreign freight earnings of the Indianapolis and St. Louis railroad?

Mr. Dye: The respondents object to this question, as wholly irrelevant, immaterial, and not cross-examination.

A. Do you mean the Indianapolis and St. Louis railroad, or the Indianapolis and St. Louis, and the St. Louis, Alton and Terre Haute?

Q. No; I mean the Indianapolis and St. Louis railroad; I do not mean the whole line; I mean the Indianapolis and St. Louis railroad proper.

A. No, sir, I have made no statement of that.

Q. In your investigation in making up that statement, you certainly arrived at some general conclusion with reference to the relative through and local earnings of the Indianapolis and St. Louis railroad proper, did you not?

A. No, sir.

Q. No idea at all?

A. No, sir; not in the least.

Q. You have data by which you could arrive at that easily, have you not?

A. No, sir; they are not disconnected on our books; they are made up from statistics.

Q. You have a book in your office that disconnects through and local earnings of the Indianapolis and St. Louis railroad proper, have you not?

A. No, sir; not now; I do not know how they may have been ormerly kept.

Q. Now I want to ask you if there were not records kept of the local and through passengers earnings on the Indianapolis and St. Louis railroad, and also on the St. Louis, Alton and Terre Haute railroad?

A. I can not answer about that now.

Mr. BUTLER: I now offer in evidence an analysis of the freight and passenger earnings of the Indianapolis and St. Louis railroad proper, for the years 1871 to 1881, inclusive; consisting of six exhibits, three of which are for passenger earnings, and three of which show the earnings of the Indianapolis and St. Louis railroad proper during the same years from express, mail, rents, rent of road, and miscellaneous. The said analysis, prepared by Russell Elliott, former auditor of the Indianapolis and St. Louis Railroad Company.

72 EASTWARD.

Tonnage and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Tonnage.			Revenue Therefrom.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	104,512	189,322	293,834	$175,765 07	$192,337 66	$368,102 73
1872	108,725	276,752	385,477	160,695 28	235,938 27	396,633 55
1873	167,819	244,954	412,773	217,351 82	224,034 07	441,385 89
1874	133,852	259,298	393,150	157,503 74	196,259 65	353,763 39
1875	102,659	209,963	312,622	120,363 38	135,767 99	256,131 37
1876	85,236	279,177	364,413	103,151 12	187,666 33	290,817 45
1877	80,169	220,261	300,430	86,931 55	140,593 72	227,525 27
1878	98,806	218,023	316,829	92,240 58	131,097 76	223,338 34
1879	132,849	229,575	362,424	115,853 94	126,553 54	242,407 48
1880	185,876	287,006	472,882	160,731 64	169,888 56	330,620 20
1881	179,215	445,932	625,147	132,094 82	167,866 66	299,961 48
Totals	1,379,718	2,860,263	4,239,981	$1,522,682 94	$1,908,004 21	$3,430,687 15

Totals from 1878 *to* 1881, *inclusive.*

	596,746	1,180,536	1,777,282	$500,920 98	$595,406 52	$1,096,327 50

WESTWARD.

Tonnage and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Tonnage.			Revenue Therefrom.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	20,553	97,462	118,015	$32,345 25	$96,436 03	$128,781 28
1872	32,329	98,385	130,714	40,880 01	109,057 39	149,937 40
1873	42,854	97,442	140,296	40,574 72	104,066 99	144,641 71
1874	22,612	82,866	105,478	27,697 83	80,867 23	108,565 06
1875	27,272	94,409	121,681	32,511 24	72,574 72	105,085 96
1876	22,899	102,376	125,275	25,634 37	69,240 31	94,874 68
1877	26,133	108,029	134,162	21,836 93	76,041 13	97,878 06
1878	22,580	92,482	115,062	19,582 23	66,681 29	86,263 52
1879	30,619	133,507	164,129	24,639 51	79,888 27	104,527 78
1880	45,080	192,698	237,728	31,729 20	105,165 47	136,894 67
1881	74,076	300,511	374,587	39,849 88	158,424 89	198,274 77
Totals	366,957	1,400,167	1,767,124	$337,281 17	$1,018,443 72	$1,355,724 89

Totals from 1878 *to* 1881, *inclusive.*

	172,305	719,198	891,503	$115,800 82	$410,159 92	$525,960 74

BOTH DIRECTIONS.

Tonnage and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Tonnage.			Revenue.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	125,065	286,784	411,849	$208,110 32	$288,773 69	$496,884 01
1872	141,054	375,137	516,191	201,575 29	344,995 66	546,570 95
1873	210,673	342,396	553,069	257,926 54	328,101 06	586,027 60
1874	156,464	342,164	498,628	185,201 57	277,126 88	462,328 45
1875	129,931	304,372	434,303	152,874 62	208,342 71	361,217 33
1876	108,135	381,553	489,688	128,785 49	256,906 64	385,692 13
1877	106,302	328,290	434,592	108,768 48	216,634 85	325,403 32
1878	121,386	310,505	431,891	111,822 81	197,779 05	309,601 86
1879	163,468	363,082	526,550	140,493 45	206,441 81	346,935 26
1880	230,906	479,704	710,610	192,460 84	275,054 03	467,514 87
1881	253,291	746,443	999,734	171,944 70	326,291 55	498,236 25
Totals	1,746,675	4,260,430	6,007,105	$1,859,964 11	$2,926,447 93	$4,786,412 04

Totals from 1878 *to* 1881, *inclusive.*

	769,051	1,899,734	2,668,785	$616,721 80	$1,005,566 44	$1,622,288 24

73 EASTWARD.

Passengers and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Passengers.			Revenue.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	23,434[2]	22,061	45,495[2]	$25,049 56	$43,761 00	$68,810 56
1872	24,749[2]	19,075[2]	43,825	24,972 15	32,443 25	57,415 40
1873	30,644	17,284[2]	47,928	30,671 02	31,141 97	61,812 99
1874	32,809[2]	18,622[2]	51,432	31,600 99	35,103 75	66,704 74
1875	26,242	15,963[2]	42,205[2]	27,528 08	29,297 09	56,825 17
1876	24,633	12,679[2]	37,312[2]	25,226 94	23,628 80	48,855 74
1877	19,440	7,156[2]	26,596[2]	21,011 16	14,067 85	35,079 01
1878	22,599	15,719	38,318	21,967 54	25,671 28	47,638 82
1879	23,132	16,412	39,544	23,120 06	27,735 33	50,855 39
1880	23,470	18,732	47,202	23,495 16	30,212 19	53,707 35
1881	38,368[2]	18,302[2]	56,672	27,875 90	27,565 29	55,441 19
Totals	294,522	182,009[2]	476,531[2]	$282,518 56	$320,627 80	$603,146 36

Totals from 1878 *to* 1881, *inclusive.*

	112,569[2]	69,166[2]	181,736	$96,458 66	$111,184 09	$207,642 75

WESTWARD.

Passengers and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Passengers.			Revenue.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	24,221[2]	24,506[2]	48,728	$24,188 71	$50,260 08	$74,448 79
1872	25,544[2]	23,204	48,748[2]	23,960 32	40,993 38	64,953 70
1873	28,289[2]	19,432	47,721[2]	24,887 02	34,233 97	59,120 99
1874	29,580[2]	18,762[2]	48,343	26,109 66	35,505 45	61,615 11
1875	25,715[2]	16,288[2]	42,004	23,859 28	31,199 15	55,058 43
1876	21,276[2]	13,715	34,991[2]	20,825 13	26,163 33	46,988 46
1877	16,436[2]	10,892	27,328[2]	16,412 01	20,338 48	36,750 49
1878	18,753	14,953	33,706	16,029 34	25,801 45	41,830 79
1879	20,905	18,716	39,621	17,354 38	30,144 51	47,498 89
1880	24,827	22,846	47,673	18,350 37	32,670 14	51,020 51
1881	32,550	30,779[2]	63,329[2]	21,382 48	35,803 30	57,185 78
Totals	268,099[2]	214,095	482,194[2]	$233,358 70	$363,113 24	$596,471 94

Totals from 1878 *to* 1881, *inclusive.*

	97,035	87,294[2]	184,329[2]	$73,116 57	$124,419 40	$197,535 97

Both Directions.

Passengers and Revenue Therefrom, Indianapolis Division I. & St. L. R. R.

Year.	Passengers.			Revenue.		
	Local.	Foreign.	Total.	Local.	Foreign.	Total.
1871	47,656	46,567[2]	94,223[2]	$49,238 27	$94,021 08	$143,259 35
1872	50,294	42,279[2]	92,573[2]	48,932 47	73,436 63	122,369 10
1873	58,933[2]	36,716[2]	95,650	55,558 04	65,375 94	120,933 98
1874	62,390	37,385	99,775	57,710 65	70,609 20	128,319 85
1875	51,957[2]	32,252	84,209[2]	51,387 36	60,496 24	111,883 60
1876	45,909[2]	26,394[2]	72,304	46,052 07	49,792 13	95,844 20
1877	35,876	18,048[2]	53,924[2]	37,423 17	34,406 33	71,829 50
1878	41,352	30,672	72,024	37,996 88	51,472 73	89,469 61
1879	44,037	35,128	79,165	40,474 44	57,899 84	98,354 28
1880	53,297	41,578	94,875	41,845 53	62,882 33	104,727 86
1881	70,918[2]	49,083	120,001[2]	49,258 38	63,368 59	112,626 97
Totals	562,621	396,104[2]	958,725[2]	$515,877 26	$683,741 04	$1,199,618 30

Totals from 1878 *to* 1881, *inclusive.*

	209,604[2]	156,461	366,065[2]	$169,575 23	$235,603 49	$405,178 72

74 Indianapolis Division I. & St. L. R. R.

Earnings from Express, Mail, Rents, Rent of Road, Miscellaneous.

Year.	Express.	Mail.	Rents.	Rent of Road.	Miscellaneous.
1871	$8,901 72	$10,166 00	$568 60	$3,089 97	$8,884 26
1872	8,508 35	8,261 50	338 00	3,857 28	324 30
1873	8,685 53	8,280 00	712 00	3,857 28	379 50
1874	8,358 11	8,280 00	1,091 25	3,857 28	124 20
1875	8,293 27	8,280 00	330 00	3,857 28	182 16
1876	8,293 28	8,280 00	366 00	3,857 28	240 12
1877	8,160 82	22,385 76	352 60	3,857 28	315 56
1878	8,293 80	8,073 80	226 00	3,000 00	280 61
1879	7,348 32	5,447 67	322 50	3,000 00	27 60
1880	8,212 96	8,229 41	325 50	3,000 00	248 40
1881	9,772 09	8,625 00	201 25	3,000 00	345 00
Totals	92,827 75	104,309 14	4,833 70	38,233 65	11,351 71

Totals from 1878 *to* 1881, *inclusive.*

	33,626 67	30,375 88	1,075 25	12,000 00	921 61

JULY 13, 1883, 10 a. m.
OFFICE OF JOHN T. DYE.

Redirect examination by JOHN T. DYE:

Q. In "Exhibit E," as printed in petitioner's evidence, on page eleven, in the statement of the cost of the road and equipment from Indianapolis to Terre Haute, is an item of two hundred thirty-three thousand five hundred seventy-six dollars ninety-two cents, in 1882, to May 23, inclusive. Will you please answer whether this improvement was made, or this money paid out, in 1882, or prior to that time, and if prior, give the date?

A. The item of two hundred thirty-three thousand five hundred seventy-six dollars ninety-two cents (except four hundred thirty-six dollars twenty-five cents) was all paid, as shown by the books of the Inianapolis and St. Louis Railroad Company, prior to August 31, 1870, for construction of line between Indianapolis and Terre Haute, to G. H. Tenney & Co., but was not charged to construction until 1882.

Q. Will you also state when the fourteen thousand five hundred and ninety-five dollars, paid in 1878, for interest on second mortgage bonds of the Indianapolis and St. Louis Railroad Company, was paid?

A. By the Union Trust Co., of New York city, April 1, 1878, for coupons matured on that date.

4 o'clock p. m.
OFFICE OF MCDONALD, BUTLER & MASON.

Recross-examination by JOHN M. BUTLER:

Q. How do you know the coupons were paid on April first?

A. They matured on that day, and they usually pay them on that day.

75 Q. Is it not the fact that in all railroad organizations coupons are dropping in for months after their maturity?

A. That sometimes occurs.

Q. They never pay before maturity, do they?

A. I never knew of a case.

Q. As the question asked you with regard to the charge to the construction account made in 1882, I will ask you if you know anything whatever with regard to the facts of that matter personally?

A. I know nothing personally about it, except what the books show.

Q. I will ask you if the books don't show this charge made in 1882?

A. The books show George H. Tenney & Co.'s credit and construction account charged in 1882 with this sum, but the original charge was made to George H. Tenney & Co. prior to August 31, 1870.

Q. On what book was the original charge made?

A. On the journal and ledger of the Indianapolis and St. Louis Railroad Company.

Q. Was the charge made against George H. Tenney & Co?

A. Yes, sir; for cash paid by them.

Q. What do you know about this being the same account as what you find on the books?

A. The debts and credits appear both in the same account and it must be the same. I know nothing, except what appears on the books.

Q. How do you know that the amount charged in 1882 is the same amount that was charged to Tenney & Co., back in 1870? What fact is there that makes you know that that is the same identical amount from any other circumstances than that it is the same amount of money?

A. Only what evidence the books show.

Q. What evidence do the books show that this money charged in 1882 is the same identical money that was charged back in 1870? Is there any circumstance showing that it is the same identical money, except that it is the same amount?

A. The ledger shows George H. Tenney & Co. charged at that time, and it now shows him credited and construction account charged with that amount. The journal entry would throw some light on it.

The following is the journal entry:

Journal F, p. 149, Dec., 1882.

Cost of road and equipment, I. & St. L. R. R.,

To G. H. Tenney, contractor----------$233,140 67

for am't which has been carried ag'st G. H. T. on acc't of suits that might be brought by the said G. H. T. ag'st the I. & St. L. R. R. Co. $233,140.67.

Q. This journal entry is all that you know about this matter?

A. This journal entry shows the charge to consruction and the credit to George H. Tenney.

Q. Well, this is the entry that you said threw light on this question isn't it?

A. Yes, sir.

MR. DYE: I offer in evidence on behalf of the respondent, J. H. Devereux, receiver of the Indianapolis and St. Louis railroad, the following:

First. The rule of the State Board of Equalization of the State of Illinois, for assessment of capital stock tax (for the years 1873, 1874, 1875, and 1876,) which is as follows, to wit:

"To the market or fair cash value of the shares of capital stock add the market or fair cash value of the debt of the corporation
76 (excluding that created for current expenses), and from this amount deduct the aggregate amount of the equalized or assessed valuation, as ascertained by the board, of all the tangible property of the corporation, the amount remaining to be taken as the fair cash value of the capital stock, including the franchise, which the board is to assess against such corporation."

Second. The assessment made by the State Board of Equalization of the capital stock of the St. Louis, Alton and Terre Haute Railroad Company for the years 1873, 1874, 1875, and 1876, as the same appear from the records of said board for said years.

Third. The certificate of such assessments made by the auditor of public accounts of the State of Illinois to the county clerks of the various counties for the year 1873, 1874, 1875, and 1876, in form, as follows:

Report of Auditor to County Clerk, Montgomery County.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
SPRINGFIELD, *October* 17, 1873.

To the County Clerk of Montgomery County:

SIR: You are hereby notified that the State Board of Equalization, at its session begun on the second Tuesday, being the twelfth day of August, 1873, assessed railway property in Montgomery county, for the year 1873, as follows:

Name of Railroad.	Class A—Railroad Track.							Class B. Rolling Stock.	Capital Stock.	Total value of R. R. property as assessed by State Board of Equalization.
	Right of Way and Improvements thereon.		Main Track.			Side 2d or Turnout.				
	Acres.	Assessed Val.	Length.		Assessed Value.	Length.	Assessed Value.	Assessed Value.	Assessed Value.	
			Miles.	*Feet.*		*Miles.*	*Feet.*			
Indianapolis & St. Louis	412.80	$22,832	34	------	$218,408	4	1771	$18,488	$86,002	------	$345,730
St. Louis, Alton & Terre Haute	------	------	------	------	------	------	------	------	------	$542,362	542,362
Toledo, Wabash & Western	164.36	15,671	19	5146	112,457	------	4599	3,656	68,801	369,931	570,606
Total	------	$38,503	------	------	$330,865	------	------	$22,144	$154,803	$912,293	$1,458,698

{ SEAL. } You will therefore, in pursuance of law, proceed to apportion the above assessed values of railroad property to the several localities in your county entitled to the same, in the manner provided by law.
Given under my hand and official seal, the date first above written.

C. E. LIPPINCOTT, *Auditor of Public Accounts.*

STATE OF ILLINOIS, *Montgomery County,* } *ss:*

{ SEAL. } I, George M. Raymond, county clerk in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the original certificate now properly on file in my office.
Given under my hand and official seal, at Hillsboro, this 14th day of January, A. D. 1881.

GEO. M. RAYMOND, *County Clerk.*

Fourth. The original receipts of the county treasurers for the taxes paid by the Indianapolis and St. Louis Railroad Company, and the receipt of the sheriff of Coles county for the taxes paid by the receiver under such assessments of the capital stock of the St. Louis, Alton and Terre Haute Railroad Company for the year 1873, as the same appear on the files of the Indianapolis and St. Louis Railroad Company in the office of the receiver.

77 And afterwards, to wit, at the May term of said court, on the 27th day of June, 1884, before the Honorable Thomas Drummond and the Honorable William A. Woods, judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

On the Intervening Petition of the St. Louis, Alton & Terre Haute Railroad Company.

This case having been heretofore submitted to the court on the pleadings, proofs, and exhibits, and upon the arguments of the counsel of the respective parties, and the same having been considered by the court, the court finds that under the circumstances and facts of the case, as established by the pleadings and evidence therein, and considering the decree made by this court July 26, 1882, there is due to the petitioner herein the sum of twelve thousand seven hundred and nineteen $\frac{58}{100}$ dollars ($12,719.58), being for the amount of rental due by the receiver, together with interest thereon; and it is ordered, adjudged, and decreed that the receiver, J. H. Devereaux, within sixty days from this date, pay the said amount to the intervening petitioner herein, and that in default thereof the same be paid out of the fund remaining in court, or hereafter to be paid into court.

78 And it is further ordered, adjudged, and decreed that the effects claimed by the receiver in this case against the claim of the intervening petitioner for the rental as aforesaid be disallowed; and the court being of the opinion that the claim for rental prior to the date when the receiver took possession of the property is not a valid claim against the proceeds arising from the sale of the property, the said claim is dismissed. And the court being further of opinion that the claim for the $164,052.82, referred to in the pleadings and evidence, is not a valid claim in this case in favor of the petitioner and against the proceeds arising from the sale of the property, said claim is hereby ordered to be dismissed. And the court being further of opinion that the claim of $91,860.05, referred to in the pleadings and evidence, is not a valid claim in this case in favor of the petitioner against the proceeds arising from the sale of the property, it is ordered that the same be dismissed; and all the orders in this case are made without prejudice to any rights or equities which may exist in favor of the petitioner under the decree of this court, already mentioned, of July 26, 1882.

79 And it is further ordered that the plaintiff pay one-half of the costs of the court to be taxed, and that the respondents pay one-half of the costs of the court to be taxed.

And the said intervening petitioner now comes and prays an appeal to the Supreme Court of the United States, which is allowed upon its giving bond according to law, to be approved by the court, in the penal sum of seven hundred and fifty dollars.

And afterwards, to wit, at the same term, and on the same day, before the honorable judges aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties by counsel, and file their stipulation and statement as to the record on appeal in the words following, to wit:

It is hereby stipulated by and between the parties in interest herein, by their counsel, as follows:

1. That the appeal to the Supreme Court of the United States, prosecuted by the St. Louis, Alton and Terre Haute Railroad Company, from the final decree rendered by the circuit court of the United States for the district of Indiana, on June 26th, 1884, upon the intervening petition of said appellant, The St. Louis, Alton and Terre Haute Railroad Company, and the cross-appeal of the
80 C., C., C. & I. Railway Co., and of J. H. Devereaux, receiver, from said final decree, may in said Supreme Court be submitted, argued, and decided in connection with the appeals of The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company *vs.* The St. Louis, Alton and Terre Haute Railroad Company, and The Pennsylvania Railroad Company *vs.* The St. Louis, Alton and Terre Haute Railroad Company, and the cross-appeal of The St. Louis, Alton and Terre Haute Railroad Company *vs.* The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and The Pennsylvania Railroad Company; which said appeals and cross-appeal are now pending on the docket of the Supreme Court of the United States.

2. It is further hereby stipulated that any and all parts of the record on this appeal of the St. Louis, Alton and Terre Haute Railroad Company from the final decree rendered on its said intervening petition, or of cross-appeal of the C., C., C. & I. Railway Company and John H. Devereaux, receiver, that are duplicates of and were repetitions of parts of the records in said other appeals and cross-appeal now pending in said Supreme Court, as above named, need not be printed in printing the record on this appeal, but the clerk may simply refer by note to the same as printed in the
81 record of said other appeals and cross-appeal.

3. It is further hereby agreed that this stipulation shall be, and the same is hereby, made part of the record of this cause on the said intervening petition of the St. Louis, Alton and Terre Haute Railroad Company.

Indianapolis, Ind., June 27, 1884.

JOHN T. DYE,
Of Counsel for C., C., C. & I. R'w'y Co., and for John H. Devereaux, Receiver.
McDONALD, BUTLER AND MASON,
Solicitors for St. L., A. & T. H. R. R. Co.

And afterwards, to wit, at the May term of said court, on the 30th day of June, 1884, before the Honorable William A. Woods, one of the judges of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the intervening petitioner, The St. Louis, Alton and Terre Haute Railroad Company, and presents to the court its bond on the appeal herein in the sum of $750.00, with George W. Parker as surety, which is now by the court approved and ordered to be filed.

(Copy of Bond.)

82 *Bond for Appeal from Decree rendered on Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company.*

Supreme Court of the United States.

HINMAN B. HURLBUT, Trustee, &c.,

vs.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, on the Intervening Petition of The St. Louis, Alton and Terre Haute Railroad Company.

Know all men by these presents, that we, The St. Louis, Alton and Terre Haute Railroad Company and George W. Parker are held and firmly bound unto Noble C. Butler, clerk of the United States circuit court for the district of Indiana, for the use and benefit of whosoever may be entitled thereto, in the penal sum of seven hundred and fifty dollars, to be paid to said Noble C. Butler, clerk, in trust, as aforesaid; to which payment, well and truly to be made, we bind onrselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals, and dated this thirtieth day of June, 1884.

83 Whereas the above-named The St. Louis, Alton, and Terre Haute Railroad Company hath presented an appeal to the Supreme Court of the United States to reverse the final decree rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is, that if the above-named St. Louis, Alton and Terre Haute Railroad Company shall prosecute its said appeal to effect, and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise, in full force.

Sealed and delivered in presence of—

[SEAL.] ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY,
By GEO. W. PARKER,
Vice Pres't and Gen'l M'g'r.
GEO. W. PARKER. [SEAL.]

Taken and approved by me this 30th day of June, 1884.

W. A. WOODS,
U. S. Dist. Judge.

84 UNITED STATES OF AMERICA, *District of Indiana*, } ss:

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district of Indiana, do hereby certify that the above and foregoing is a full, true and complete transcript of the record in the case of Hinman B. Hurlbut, trustee, &c., against The Indianapolis and St. Louis Railroad Company, relating to the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, including all pleadings, entries, orders, and decrees filed, made and entered in said court, in connection with said intervening petition, as fully as the same remains upon the records now in my office.

Witness my hand, and the seal of said court, at Indianapolis, in said district, this 30th day of July, A. D. 1884.

[SEAL.] NOBLE C. BUTLER, *Clerk*.

Costs of transcript, $41.50, paid.

NOBLE C. BUTLER, *Clerk*.

Endorsed on cover: Indiana C. C. U. S. No. 1238. The St. Louis, Alton & Terre Haute Railroad Company, appellant, *vs.* The Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, John H. Devereux, receiver of the Indianapolis & St. Louis R. R. Co., and The Pennsylvania Railroad Co. Filed 6th December, 1884.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, *Appellant*,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

No. 192.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY.

BY

JOHN M. BUTLER.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, *Appellant*,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

No. 192.
October Term, 1887.
Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY.

STATEMENT OF THE CASE.

This is an appeal from the decree of the Circuit Court of the United States for the District of Indiana upon the Intervening Petition of the St. Louis, Alton and Terre Haute Railroad Company for payment, out of

the proceeds of the sale of the Indianapolis and St. Louis Railroad, of the amount due for the use by the Indianapolis and St. Louis Railroad Company of the railroad and equipment of the St. Louis, Alton and Terre Haute Railroad Company.

The contest is bewteen the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the St. Louis, Alton and Terre Haute Railroad Company. The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, as the owner of substantially all of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company, contends that the entire purchase-money fund in Court arising from the sale of the Indianapolis and St. Louis Railroad at foreclosure sale should be applied in payment of its bonds.

The St. Louis, Alton and Terre Haute Railroad Company claims that the amount justly and equitably due to it from the Indianapolis and St. Louis Railroad Company for the use of its railroad and franchises from Terre Haute to St. Louis, with the equipment thereof, should be paid out of said purchase-money fund before any part thereof is applied to the payment of the bonds held by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, appellee herein.

The facts necessary to a just understanding of the issues involved are as follows:

1. Prior to July, 1870, there was but one line of railroad between Indianapolis and St. Louis. This line was composed of the St. Louis, Alton and Terre Haute Railroad, extending from East St. Louis to Terre Haute, with a branch extending to Alton, Illinois, and the Terre

Haute and Indianapolis Railroad, extending from Terre Haute to Indianapolis.

2. On May 17, 1867, the Bellefontaine Railway Company, an Indiana corporation, and the Cleveland, Columbus and Cincinnati Railroad Company, an Ohio corporation—said two companies, by consolidation, now constituting the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company,—together with certain other railroad corporations owning and operating lines of railroad east of Indianapolis desiring, for their benefit, to control a continuous connecting line of railroad between Indianapolis and St. Louis, entered into a certain contract in writing with the St. Louis, Alton and Terre Haute Railroad Company, by which they promised and agreed that, in consideration of the execution by the St. Louis, Alton and Terre Haute Railroad Company, *at their instance*, of a certain lease conveying the possession and use of its railroad from Terre Haute to East Louis, together with the Alton branch thereof, and the entire equipment and franchies of said leased line, for the period of ninety-nine (99) years, the Terre Haute and Indianapolis Railroad Company should become the lessee in said lease; and further, that in the event of the refusal of the Terre Haute and Indianapolis Railroad Company to become lessee if the St. Louis, Alton and Terre Haute Railroad Company would accept as lessee "any other responsible corporation owning or constructing a railroad from Indianapolis to Terre Haute," they further promised, agreed and guaranteed "that the said Terre Haute and Indianapolis Railroad Company, or such other corporation as may be substituted therefor,

shall at all times thereafter keep, observe and perform all and singular the covenants, conditions and provisions of the aforesaid contract," being the lease above mentioned. This contract appears in the record. (Record, pp. 11, 12.)

On the same day (May 17, 1867) the St. Louis, Alton and Terre Haute Railroad Company did, in consideration of said contract of guaranty, and at the special instance and request of said parties signing said contract of guaranty, execute a lease or operating contract, conveying the possession and use of its railroad, equipment and franchises extending from Terre Haute to East St. Louis, with the branch to Alton, to the Terre Haute and Indianapolis Railroad Company for ninety-nine (99) years, the lease to become operative as of the first day of June, 1867. This lease appears in the record. (Record, pp. 12–21.)

3. The Terre Haute and Indianapolis Railroad Company refused to become lessee in the lease executed by the St. L., A. & T. H. R. R. Co., on May 17, 1867. Thereupon the Pennsylvania R. R. Co. withdrew from the combination or syndicate of railroad companies signing the contract of May 17, 1887, and, in conncetion with the Terre Haute and Indianapolis Railroad Company, organized the St. Louis, Vandalia and Terre Haute Railroad Company, and, through that corporation, began the construction of a new railroad from the Indiana State line to St. Louis, the Terre Haute and Indianapolis Railroad Company extending its line from Terre Haute to the west boundary line of Indiana to meet the new road at that point. This new railroad across Illinois

was built, and is now known as the "Vandalia Line." Before the Vandalia Line was constructed, to-wit: on February 10, 1868, the St. Louis, Vandalia and Terre Haute Railroad Company leased its road, to be constructed, to the Terre Haute and Indianapolis Railroad Company for nine hundred and ninety-nine (999) years under a contract in its main features very similar to the lease executed by the St. L., A. & T. H. R. R. Co., above mentioned.

Shortly after the refusal of the Terre Haute and Indianapolis Railroad Company to become lessee of the St, L., A. & T. H. R. R. and the withdrawal of the Penn. R. R. Co. from the syndicate of companies, the remaining companies of the syndicate, the C., C., C. & I. Ry. Co., being one of the principal parties, organized the Indianapolis and St. Louis Railroad Company, for the express purpose of its becoming the lessee of the St. L., A. & T. H. R. R. under the contract of May 17, 1867, instead of the Terre Haute and Indianapolis Railroad Company, and for the purpose of constructing, under the corporate powers of the Indianapolis and St. Louis Railroad Company, a new railroad from Terre Haute to Indianapolis to form, in connection with the line leased from the St. L., A. & T. H. R. R. Co., a continuous line of road from Indianapolis to St. Louis.

The Indianapolis and St. Louis Railroad Company was organized early in September, 1867. On September 11, 1867, immediately after its organization, and before any work of construction had been done, the remaining syndicate companies requested the St. L., A. & T. H. R. R. Co. to accept the I. & St. L. R. R. Co. as le-

see under the contract of May 17, 1867, in lieu of the Terre Haute and Indianapolis Railroad Company. In connection with this request, the remaining syndicate companies entered into a new contract with the St. L., A. & T. H. R. R. Co. by which they covenanted and guaranteed that the Indianapolis and St. Louis Railroad Company should at all times keep, observe and perform all and singular the covenants, conditions and provisions of the lease or operating contract dated May 17, 1867, and also of the contract of September 11, 1867, substituting the Indianapolis and St. Louis Railroad Company as lessee in lieu of the Terre Haute and Indianapolis Railroad Company.

This contract of substitution, and the contract of September 11, 1867, signed by the remaining companies of the original syndicate, both appear in the record. (Record p. 11, and pp. 21-27 inclusive.)

Counsel for the C., C., C. & I. Ry. Co.—Mr. Burke,—in his brief on the former appeal, at page 120, in speaking of this contract of September 11, 1867, said:

"The guaranteeing companies desired it (St. L., A. & T. H. R. R. Co.) to execute a lease to the Indianapolis and St. Louis Railroad Company, a corporation organized under the laws of the State of Indiana, and the complainant yielding to their request, entered into the contract of lease in question."

A single clause of the contract of September 11, 1867, makes it very certain that the St. L., A. & T. H. R. R. Co. yielded the possession and use of its railroad, equipment and franchises to the Indianapolis and St. Louis Railroad Company *at the special instance and re-*

quest of the companies signing that contract. The C., C., C & I. Ry. Co., now contesting against the payment of rent due the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment was a principal party to that contract and the leading party of the syndicate. The clause reads as follows:

"And whereas the said parties of the first part, second and third parts have caused a new company to be duly organized under the laws of the State of Indiana, and by the name of the Indianapolis and St. Louis Railroad Company, and have requested the said party of the fourth part to accept the said new company as the party of the first part to the said operating contract, and the said party of the fourth part has, in compliance with such request, agreed to accept the said new company in the place and stead of the Terre Haute Railroad Company, but without waiving or intending to waive any claim against the said Pennsylvania Railroad Company, or any other party, arising out of anything in the premises mentioned or otherwise, and has at the special instance and request of the parties of the first, second and third parts hereto, and in consideration of the execution of these presents, this day duly executed and delivered to the said Indianapolis and St. Louis Railroad Company an instrument in writing, bearing even date herewith, whereby the said Indianapolis and St. Louis Railroad Company has been substituted for and put in the place of the said Terre Haute and Indianapolis Railroad Company upon the terms and conditions therein and in the said agreement of guaranty contained." (Record p, 26.)

4. Shortly after the organization of the Indianap-

olis and St. Louis Railroad Company, and before the construction of its railroad had been commenced, the Indianapolis, Cincinnati and Lafayette Railroad Company, becoming financially embarrassed, dropped out of the syndicate and took no further interest in the matter. If the Lake Shore, and Michigan Southern Railroad Company ever took any active interest as a member of the syndicate, it must have done so through the C., C., C. & I. Ry. Co. The record discloses no action on its part after signing the contract of September 11, 1867.

This left the C., C., C. & I. Ry. Co. and the Pittsburgh, Ft. Wayne and Chicago Railway Company as the sole owners of the Indianapolis and St. Louis Railroad, and, through it, the sole controllers of the railroad and equipment leased from the St. L., A. & T. H. R. R. Co.

That these two companies last named so understood the situation and acted upon that understanding, is clearly evidenced by the contract entered into by and between them on May 1, 1869. This contract is in evidence and appears in the record. (Record pp. 27-32.)

A single clause of this contract between these two companies, found on the 28th page of the record in this appeal, fully confirms the above statement. The clause reads as follows:

"Whereas the parties hereto are the sole and equal owners of the capital stock of the said Indianapolis and St. Louis Railroad Company, and further purpose to furnish or provide the residue of the means necessary for the construction of the said Indianapolis and St. Louis Railroad." (Record p. 28.)

5. Some doubt having arisen as to the power of the St. L., A. & T. H. R. R. Co., as an Illinois corporation, to lease out its railroad and franchises to a railroad corporation of another State, the Legislature of Illinois, on March 11, 1869, passed a special act fully ratifying and confirming the lease or contract of September 11, 1867, between the St. L., A. & T. H. R. R. Co. and the Indianapolis and St. Louis Railroad Company, and, in order that said special act might not infringe the generally understood public policy of the State of Illinois prohibiting its railroad corporations from leasing or contracting away their property and franchises to corporations of other States, the Legislature in said special act not only confirmed the lease, but also created the Indianapolis and St. Louis Railroad Company a corporation of Illinois, as to the possession, operation and control of the railroad and franchises leased by it from the St. L., A. & T. H. R. R. Co. under the contract of September 11, 1867. This act of the Legislature of Illinois is quoted and construed in the decision of this Court in the case of *Railroad Company* v. *Vance*, 96 U. S. 453.

No one then seems to have doubted or in any degree questioned, the power of an Indiana railroad company to become lessee of the railroad and franchises of an Illinois railroad corporation.

6. On June 7, 1869, the Penn. R. R. Co. entered into a contract of lease with the Pittsburgh, Ft. Wayne and Chicago Railway Company by which it leased the entire railroad, equipment and franchises of the P., Ft. W. & C. Ry. Co. for nine hundred and ninety-nine (999) years. By the terms of this lease the Penn. R. R. Co.

expressly assumed all the obligations of the P., Ft. W. & C. Ry. Co. under and by virtue of the contract of September 11, 1867, regarding the lease of the St. L., A. & T. H. R. R. Co. and agreed to fully perform that contract.

This statement is admitted by the answer of the Penn. R. R. Co. in the suit brought by the St. L., A. & T. H. R. R. Co. to enforce specific performance of the contract of September 11, 1867. This answer is printed in the record of the former appeal in this litigation, the above admission appearing on page 95 of said record. The pleadings and evidence in that record were put in evidence under the issues joined upon this intervening petition. By stipulation all matter printed in the record of the former appeal is not printed again in this record. (Record p. 93, second clause of stipulation; also Record pp. 45, 46.)

At the time the Penn. R. R. Co. leased the P. Ft. W. & C. Ry. but little progress had been made towards the construction of the Indianapolis and St. Louis Railroad.

Under this lease the Penn. R. R. Co. took from the P. Ft. W. & C. Ry Co. all the stock of the Indianapolis and St. Louis Railroad Company then held or subscribed for by the P. Ft. W. & C. Ry. Co., being about one-half of the entire capital stock of the Indianapolis and St. Louis Railroad Company, and as an equal partner with the C., C., C. & I. Ry. Co., by reason of its lease of the P. Ft. W. & C. Ry. proceeded with the construction of the Indianapolis and St. Louis Railroad.

7. The C., C., C. & I. Ry. Co. and the Penn. R. R. Co., as lessee of the P. Ft. W. & C. R. R., built the Ind-

ianapolis and St. Louis Railroad, the chief work of construction being performed between June 7, 1869, and July 10, 1870.

From the time of the organization of the Indianapolis and St. Louis Railroad Company in September, 1867, down to the time of its extinction by foreclosure sale in July, 1882, its directors, officers and managers were chosen by the C., C., C. & I. Ry. Co., and the P., Ft. W. & C. Ry. Co., or its lessee, the Penn. R. R. Co., substantially all of the directors, officers and managers of the Indianapolis and St. Louis Railroad Company being at the same time officers and directors of the C., C., C. & I. Ry. Co. and the P., Ft. W. & C. Ry. Co., or its lessee, the Penn. R. R. Co., the directors, officers and managers of the Indianapolis and St. Louis Railroad Company being divided, as nearly as practicable, evenly between the said two companies owning substantially all of the capital stock of the Indianapolis and St. Louis Railroad Company.

From June 7, 1869, forward, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. furnished the means for the construction of the Indianapolis and St. Louis Railroad in equal amounts in payment for its capital stock and mortgage bonds. They held its capital stock—excepting only a few shares—in nearly equal proportions. They took its first mortgage bonds in equal proportions. These facts are clearly established by the evidence in the record of the former appeal, and will not be here disputed. (See Record of former Appeal, pp. 82, 112, 184, 192, 193, 197, 198, 211.)

The record in this present appeal shows conclusively that the C., C., C. & I. Ry. Co. and the Penn. R.

R. Co. took all of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company in exactly equal proportions, and that instead of taking these bonds of the corporation organized and controlled by them, and which they had covanented should remain solvent and pecuniarily responsible, at par, they took its bonds, bearing a high rate of interest, at an enormous and ruinous discount. (Record, p. 51.)

8. In addition to the means derived from payment for its capital stock, the Indianapolis and St. Louis Railroad Company, under the direction and control of the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., as owners of substantially all of its capital stock, issued three series of mortgage bonds, secured by three separate mortgages, as follows:

First Mortgage Bonds..... $2,000,000.

These bonds bear seven per cent. interest, payable semi-annually, and the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. took these bonds at 90 cents on the dollar, making a discount of..... $200,000.

Second Mortgage Bonds..... $1,000,000.

These bonds bore seven per cent. interest, payable semi-annually. The C., C., C. & I. Ry. Co. and the Penn. R. R. Co. took all of these second mortgage bonds at 75 cents on the dollar, making a discount of..... $250,000.

Third or Equipment Mortgage Bonds..... $500,000.

These bonds bore eight per cent. interest, payable semi-annually. The C., C., C. & I. Ry. Co. and the Penn. R. R. Co. took all this issue of $500,000 at a discount of..... $62,000.

(Record, p. 51.)

Here are Indianapolis and St. Louis Railroad Company mortgage bonds to the amount of $3,500,000 taken at a discount of $512,000.

If these bonds had been sold to strangers at this rate the discount would have been regarded as enormous and ruinous, but they were not sold to strangers. They were taken in at this ruinous discount by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., then and ever after that time, the owners of substantially all of the capital stock of the Indianapolis and St. Louis Railroad Company, and its controllers and managers, their directors and officers being also its directors, officers and managers.

It should also be borne in mind that before taking these bonds at this excessive discount, the C., C., C. & I. Ry. Co. and the P., Ft. W. & C. Ry. Co.,—and, through it, its lessee, the Penn. R. R. Co.,—had, by a written contract, in which they guaranteed that the Indianapolis and St. Louis Railroad Company should remain solvent and responsible, and should faithfully perform its contract of lease, induced the St. L., A. & T. H. R. R. Co. to accept the Indianapolis and St. Louis Railroad Company as its lessee in the lease or operating contract of September 11, 1867.

9. The lease remained in force and its provisions were performed by both parties in apparent good faith, and without question, until April 1, 1878. By the terms of the contract the minimum rent, to be paid monthly, for the use by the Indianapolis and St. Louis Railroad Company of the railroad and equipment of the St. L., A. & T. H. R. R. Co. was $37,500. By the contract 30

per cent. of the gross earnings of the leased line, *earned on its track*, were specifically set apart and devoted to the payment of the rent, but it was further provided that the minimum rent of $37,500 should be paid monthly whether the 30 per cent. of the gross earnings earned on the track of the leased line did or did not amount to that sum.

A moment's reflection will demonstrate to any one that the earnings of the leased line, *on its track alone*, was by no means the measure of the value to the Indianapolis and St. Louis Railroad Company and its owners, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., of the use of the railroad and equipment of the St. L., A. & T. H. R. R. Co. These stockholders of the Indianapolis and St. Louis Railroad Company did not procure this lease from the St. L., A. & T. H. R. R. Co., organize the Indianapolis and St. Louis Railroad Company, take its stock and bonds, and furnish means for the construction of the Indianapolis and St. Louis Railroad simply to secure the earnings made by the leased line *on its track*. That was the very smallest part of the consideration. *They wanted to control and procure business for their own lines.* In order to do this they had to have a through line from Indianapolis to St. Louis.

During the period from June 1, 1867 to July 1, 1870,—which period covers the organization of the Indianapolis and St. Louis Railroad Company and the construction of its railroad from Indianapolis to Terre Haute—30 per cent. of the gross earnings of the leased line from Terre Haute to St. Louis, with branch to Alton, largely exceeded the minimum rent of $37,500 per

month. This excess of earnings of the leased line over and above full payment of its rental went directly to the benefit of the Indianapolis and St. Louis Railroad Company. The lease, by its terms, took effect as of June 1, 1867, and although the Indianapolis and St. Louis Railroad Company was not organized until September of that year, and although its road was not completed and opened for business until July 10, 1870, still the Indianapolis and St. Louis Railroad Company actually received all the earnings of the leased line, and all the benefits accruing under the lease from and after June 1, 1867. This fact is proven beyond question by the testimony of Charles Butler and of George W. Parker, printed in the record of the former appeals on pages 167 and 189 of said record. That thirty per cent. of the gross earnings of the leased line exceeded the rent provided for in the lease during the period from June 1, 1867, to July 1, 1870, is proven by the evidence introduced by the C., C., C. & I. Ry. Co. on this intervening petition, as shown by Exhibit "S." (Record, p. 78.)

From July 10, 1870, forward, the Indianapolis and St. Louis Railroad Company and its owners, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., received the benefit and advantage of transporting all the freight and passengers transported over the leased line from St. Louis to Terre Haute, which composed the bulk of the business of the Indianapolis and St. Louis Railroad Company and its said owners, particularly the C., C., C. & I. Ry. Co., which business the Indianapolis and St. Louis Railroad Company and the C., C., C. & I. Ry. Co. could not have received or controlled except for the possession

and control, by the Indianapolis and St. Louis Railroad Company, of the leased line.

After the Indianapolis and St. Louis Railroad was completed, and the new Vandalia line was completed, both of which roads were opened for traffic early in July, 1870, there were two parallel competing lines between Indianapolis and St. Louis. The division of the business between these competing lines somewhat curtailed the gross earnings of the Indianapolis and St. Louis Railroad and its leased line, the St. L., A. & T. H. R. R.

But it is an important fact, worthy of careful remembrance, that from June 1, 1867, to May 23, 1882, the gross earnings of the Indianapolis and St. Louis Railroad and its leased line, the St. L., A. & T. H. R. R., were amply and abundantly sufficient to pay all operating expenses of both lines, *including the rent of the St. L., A. & T. H. R. R.*, and for all needed repairs, improvements and betterments to both the Indianapolis and St. Louis Railroad and its leased line,—the St. L., A. & T. H. R. R.,—and leave a large surplus over to be applied on payment of bond interest. (Record, pp. 78 and 80.)

This statement is true of each year separately, excepting only the years 1878, 1881, and the first months of 1882, down to the close of May. In the period from January 1, 1881, to May 23, 1882, a little less than seventeen months, there was charged up to the operating expenses of the Indianapolis and St. Louis Railroad alone, that road being only seventy-one miles in length, $822,530. (Record, p. 50.) This is $11,584.90 per mile, for operating expenses of seventeen months, or at the rate

of nearly $9,000 per mile per year for operating expenses. No one, in the least degree acquainted with railroading, will fail to know that such charge is not a correct charge for simple operating expenses. The fact is that during that period the Indianapolis and St. Louis Railroad was practically rebuilt, and the rebuilding thereof was charged as ordinary operating expenses, and so increased the operating expenses as to create a deficiency. More than the entire gross earnings of the road from Indianapolis to Terre Haute during these seventeen months was expended in what was called "Operating Expenses," but really in rebuilding the road. (Record, p. 50.)

The total amount charged against operating expenses for the entire line from Indianapolis to St. Louis during the seventeen months beginning January 1, 1881, and ending May 23, 1882, is $2,816,642.08, nearly double the operating expenses for any other like period between 1867 and 1881. (Record, p. 78.) These facts clearly demonstrate that the Indianapolis and St. Louis Railroad Company and its stockholders and bondholders, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., deliberately determined to rebuild the Indianapolis and St. Louis Railroad preparatory to taking it in at foreclosure sale.

During the period from June 1, 1867, down to the close of the year 1874, the gross earnings of the entire line from St. Louis to Indianapolis were fully sufficient to pay all operating expenses, *including rent for the St. L., A. & T. H. R. R.*, all repair and improvement expenses, AND ALL INTEREST ON INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY MORTGAGE BONDS. (Record, p. 78.)

From 1875 to July, 1882, the gross earnings of the entire line from Indianapolis to St. Louis were more than sufficient to pay all operating expenses, including rent to the St. L., A. & T. H. R. R. Co., and all repairs and improvement expenses, but the remaining surplus was not sufficient to pay all of the Indianapolis and St. Louis Railroad Company bond interest.

10. In the years 1875, 1876, 1877 and 1878 the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., as lessee of the P., Ft. W. & C. Ry., made certain advances, in equal amounts, to the Indianapolis and St. Louis Railroad Company. The total of these advances for the four years above named were, C., C., C. & I. Ry. Co., $583,-585.12; Penn. R. R. Co., $583,585.12.

After 1878 the Penn. R. R. Co. made no further advances. It subsequently disposed of its Indianapolis and St. Louis Railroad Company bonds and stock to the C., C., C. & I. Ry. Co. and ceased to take any active interest in the property or in the litigation touching the St. L., A. & T. H. R. R. Co. lease of September 11, 1867.

The C., C., C. & I. Ry. Co. made no advances from June, 1878, until July, 1881. From July 1, 1881, up to May 23, 1882, the C., C., C. & I. Ry. Co. made other advances to the Indianapolis and St. Louis Railroad Company amounting in the aggregate to $415,000, making the total advances to the Indianapolis and St. Louis Railroad Company by these two companies holding all of the capital stock and substantially all the bonds of the Indianapolis and St. Louis Railroad Company, $1,-582,170.24. (Record pp. 46, 47, 48.)

This record further shows that there has been paid

out by the Indianapolis and St. Louis Railroad Company on interest on its mortgage bonds, which were all originally taken by these two companies and were chiefly held by them during this period, the sum of $2,234,396.-62. (Record pp. 52, 78.)

Hence it is clear that the Indianapolis and St. Louis Railroad Company paid out in bond interest to these two companies, its chief bondholders, as well as its chief stockholders, over $600,000 more than it ever received from them as advances under their guarantee contract of September 11, 1867.

It should also be remembered that while these advances were being made, particularly in the years 1880, 1881 and the first five months of 1882, enormous amounts were expended in rebuilding and adding value to the Indianapolis and St. Louis Railroad, swelling the charges for ordinary operating expenses to nearly double the actual operating and repair expenses.

It should also be remembered that every dollar thus expended in rebuilding and bettering the Indianapolis and St. Louis Railroad went directly to the benefit of the bondholders, the C., C., C. & I, Ry. Co., then being the owner of substantially all of the second and third mortgage bonds, and being, presumably, the chief owner and holder of the first mortgage bonds.

The total amount realized from the three series of bonds of the Indianapolis and St. Louis Railroad Company was $2,982,000. (Record p. 51.) This money and the money derived from capital stock was expended in building the Indianapolis and St. Louis Railroad. After the road was completed and open for business, to-wit:

between January 1, 1871, and May 23, 1882, there was expended in new work, equipment and betterments on the Indianapolis and St. Louis Railroad between Indianapolis and Terre Haute in addition to the enormous amounts charged to ordinary operating expenses, the further amount of $1,304,739.53, charged to construction account. (Record p. 53.)

Hence the account really stands thus: As between the Indianapolis and St. Louis Railroad Company and its bondholders total interest paid down to May 23, 1882, $2,234,896.62. Amount expended by the Indianapolis and St. Louis Railroad Company between January 1, 1871, and May 23, 1882, for new construction, additions and new equipment, $1,304,739.53, making the total benefit received by the bondholders in interest and added value to their property prior to the foreclosure, $3,539,-136.15, while the total amount advanced to the Indianapolis and St. Louis Railroad Company by these bondholders was only $1,582,170.24.

These figures show that the bondholders, namely, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. have received from the Indianapolis and St. Louis Railroad Company in interest on their bonds and in values added to their mortgaged estate over and above all advances made by them $1,956,965.91; this, too, when they only paid $2,982,000 for the entire $3,500,000 of bonds issued by the Indianapolis and St. Louis Railroad Company.

These facts and figures show that there is no foundation for the claim that the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. advanced money to the Indianapolis and St. Louis Railroad Company to enable it to pay its

rent to the St. L., A. & T. H. R. R. Co. There was always an abundance of gross earnings to pay the rent and all other operating and repair expenses. The advances were made to help the Indianapolis and St. Louis Railroad Company pay its interest and improve and add to the value of its property covered and conveyed by the mortgages securing the bonds held by these two companies making the advances. A considerable part of these advances was made after April 1, 1878, at which date the Indianapolis and St. Louis Railroad Company ceased paying rent to the St. L., A. & T. H. R. R. Co., under its lease of September 11, 1867. It certainly cannot be claimed that advances made by the C., C., C. & I. Ry. Co. after the Indianapolis and St. Louis Railroad Company had ceased paying rent under its lease are to be considered as advances made for the purpose of paying rent to the St. L., A. & T. H. R. R. Co. The facts disclosed by the record show that those advances were made to help the Indianapolis and St. Louis Railroad Company rebuild its road preparatory to a foreclosure sale.

The record shows that the gross earnings of the entire line from St. Louis to Indianapolis for the fifteen years from June 1, 1867, to May 23, 1882, were $26,868,-252.31. (Record p. 78,) Of this amount, the gross earnings of the Indianapolis and St. Louis Railroad Company on its own line from Indianapolis to Terre Haute were only $6,763,866.93, (Record p. 50) while the gross earnings of the leased line from Terre Haute to St. Louis were $20,104,885.38. (Record p. 65.) The Indianapolis and St. Louis Railroad from Indi-

anapolis to Terre Haute is seventy-one miles in length. The leased line from Terre Haute so St. Louis, with branch to Alton, is one hundred and ninety-three miles in length. A moment's computation on these figures will demonstrate that the average gross earnings of the leased line per mile per year for the entire period were fully equal to, if not in excess of, the average gross earnings per mile per year of the Indianapolis and St. Louis Railroad Company on its own line.

The record further shows that the average operating, repair and improvement expenses of the Indianapolis and St. Louis Railroad Company on its line per mile per year were far greater than the average operating, repair and improvement expenses of the leased line per mile per year. The amount charged to operating expenses of the Indianapolis and St. Louis Railroad Company on its own line for the twelve years in which it was in operation, to-wit: from July 1, 1870, to May 23, 1882, was $4,602,975.90. (Record, p. 50.) But during this same period, in addition to the amount charged for operating expenses, there was expended in improvements and betterments made to the Indianapolis and St. Louis Railroad from January 1, 1871, to May 23, 1882, the further sum of $1,304,739.53. (Record, p. 53.) This amount added to the amount charged to operating expense account shows that during the twelve years there was expended upon the Indianapolis and St. Louis Railroad from Indianapolis to Terre Haute for operating expenses, repairs and improvements over $7,000 per mile per year. The total amount expended upon the leased line for operating expenses, repairs and improvements

during the entire fifteen years was $14,814,102.36. This is an average expenditure of $5,168.94 per mile per year upon the leased line.

These figures show that while the gross earnings per mile per year of the leased line were fully equal to the gross earnings of the Indianapolis and St. Louis Railroad Company on its own line, the operating, repair and improvement expenses of the Indianapolis and St. Louis Railroad Company on its own line, were nearly $2,000 per mile per year more than was expended per mile per year upon the leased line. These figures conclusively establish the fact that the use of the leased line was of very great pecuniary value to the Indianapolis and St. Louis Railroad Company. Instead of its being a dead weight upon the Indianapolis and St. Louis Railroad Company, as claimed by this bondholder, the C., C., C. & I. Ry. Co., the figures and facts disclosed by this record show conclusively that it was a pecuniary benefit to the Indianapolis and St. Louis Railroad Company even if no other element of value is considered than merely the earnings made upon the track of the leased line.

11. On April 1, 1878, the Indianapolis and St. Louis Railroad Company refused to pay the installment of rent then due to the St. L., A. & T. H. R. R. Co., and from that time forward refused to pay any rent whatever, although continuing in the possession and use of the leased line and equipment, and receiving the full benefit of the operation of said leased line. No rent whatever was paid from March, 1878, until December 16, 1878.

On October 26, 1878, the St. L., A. & T. H. R. R. Co. brought suit to enforce the performance of the lease touching the payment of rent, and in the same suit sought to hold the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., as lessee of the P., Ft. W. & C. Ry. Co., liable for said unpaid rent upon their contract of guaranty of September 11, 1867.

Under that suit the Circuit Court entered an interlocutory order requiring the Indianapolis and St. Louis Railroad Company to pay over to the St. L., A. & T. H. R. R. Co., or for its benefit, thirty per cent. of the gross earnings of the leased line accruing after the entry of said order. The first payment under that order was made December 16, 1878, and was $28,655.10. The total rent received by the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment for the entire year of 1878 was as follows: For January, February and March $37,500 each, making $112,500. On December, 16, 1878, under order of Court $28,655.10, making total rent paid during the year 1878, $141,155.10. (Record, pp. 78 and 83.)

The enforcement of the lease and guaranty contracts of September 11, 1867, was resisted by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. on the ground that both of the guaranty contracts of May 17th and September 11, 1867, and the lease of September 11, 1867, were *ultra vires*.

The Circuit Court on July 26, 1882, entered a final decree in that litigation. That final decree and the pleadings and chief evidence in that litigation were offered in evidence under this intervening petition. (Record, pp. 45, 46).

By stipulation it was agreed that the pleadings, and orders, decrees and testimony of that suit introduced in evidence upon this intervening petition need not be again printed as part of this record. (Record, p. 93, second clause of stipulation.)

For convenience and to save the necessity of referring to the printed record of the former appeals, the decree of the Circuit Court of July 26, 1882, is printed in full in an appendix to this brief. (Appendix p., 1. *et seq.*)

Appeals were prosecuted to this Court from the final decree of the Circuit Court rendered July 26, 1882.

12. While the litigation touching the validity and enforcement of the lease and guaranty contracts was pending, Hinman B. Hurlbut, as Trustee in the second mortgage, and also in the third, or equipment, mortgage of the Indianapolis and St. Louis Railroad Company, filed a bill to foreclose said second and third mortgages and sell the railroad and franchises of the Indianapolis and St. Louis Railroad Company subject to the lien of the first mortgage, which secured bonds of the par value of $2,000,000.

Upon the application of the complainant in the foreclosure suit John H. Devereux was appointed Receiver of the Indianapolis and St. Louis Railroad Company pending said foreclosure proceedings.

A decree of foreclosure was rendered on May 22, 1882. The property and franchises of the Indianapolis and St. Louis Railroad Company were sold,—subject to the first mortgage,—on July 28, 1882, for the sum of $1,396,000. The purchaser was in fact the C., C., C. & I. Ry, Co., although the purchase was made in the name of E. B. Thomas.

The Indianapolis and St. Louis Railroad Company was reorganized under the name of the Indianapolis and St. Louis Railway Company, and the road was conveyed to the new company by the purchaser. The purchaser was given possession of the railroad and property so sold without paying the purchase money into Court,—excepting about $100,000,—upon giving bond and security to pay in from time to time such sums as the Court may decree payable out of such proceeds of sale.

The pleadings, papers and records in said foreclosure proceedings under which this intervening petition is filed were introduced in evidence upon the hearing of this intervening petition. Solicitors for both parties to said intervening petition supposing that said pleadings, papers and records had been printed in the record of the other appeals then pending in this Court, they were omitted from the record of this appeal by stipulation. (Record p. 46, second clause of stipulation.)

It now appears that these papers were not printed in the record of the former appeals. Certified copies of the order oppointing Devereux Receiver, the final foreclosure decree and bond under which possession was given to the purchaser have been procured from the Clerk of the Circuit Court, and for convenience of reference are printed in an appendix to this brief. (Appendix pp. 8 to 27.)

By the order appointing Devereux Receiver it was expressly provided as follows:

"This Court expressly reserves to itself the right and power to make such orders and decrees touching the payments of the debts of the said Indianapolis and

St. Louis Railroad Company incurred in the management and operation of said railroad prior to the appointment of said Receiver as may be equitable and just." (Appendix p. 11.)

By the foreclosure decree it was provided as follows:

"And it is further ordered and decreed by the Court that after the payment of said sum of $100,000 purchase money upon the sale of said premises by the purchaser thereof, that the residue of the purchase money or such portion thereof as may not be required by the Court to be paid in cash, shall be secured by a bond to be approved by the Court, for the payment thereof, at such time or times as the Court may order. The Court reserves to itself the right by subsequent order or orders to distribute the proceeds of the sale of said railroad and property connected therewith, and to make such further order and decree in regard to the distribution of the proceeds of sale as may to the Court seem just and equitable." (Appendix p. 23.)

This purchase money fund has never been paid into Court or distributed under the order of the Court, but is awaiting the decision of this Court upon this appeal.

13. Appeals having been taken from the decree of the Circuit Conrt of July 26, 1882, in favor of the St. L., A. & T. H. R. R. Co., holding the lease and guaranty contract of September 11, 1867, valid, and desiring to protect the interests of the St. L., A. & T. H. R. R. Co. in case this Court should reverse that decree, the solicitors for the St. L., A. & T. H. R. R. Co. filed and prosecuted this intervening petition, asking the Court to pay the rent found due from the Indianapolis and St. Louis

Railroad Company to the St. L., A. & T. H. R. R. Co., out of the proceeds of the sale of the property and franchises of the Indianapolis and St. Louis Railroad Company.

The Circuit Court,—Judge Drummond, presiding,—declined to order the payment and dismissed the intervenpetition *because of the former decree the Court had rendered in favor of the St. L., A. & T. H. R. R. Co.*

No one can read the decree dismissing this intervening petition without clearly understanding that the Court refused the prayer of the intervening petition because the Court had rendered the decree of July 26, 1882, in favor of the St. L., A. & T. H. R. R. Co. upon the same indebtedness mentioned in the intervening petition. This is made clear by the following words of the decree dismissing the intervening petition, viz:

"The Court finds that under the circumstances and facts of the case, as established by the pleadings and evidence therein, AND CONSIDERING THE DECREE MADE BY THIS COURT JULY 26, 1882. * * * and all the orders in this case are made without prejudice to any rights or equities which may exist in favor of the petitioner under the decree of this Court, already mentioned, of July 26, 1882." (Record p. 92.)

The decree of July 26, 1882, in favor of the St. L., A. & T. H. R. R. Co. found the amount of rent, including interest, due to the St. L., A. & T. H. R. R. Co. up to July 1, 1882, to be $664,874.70.

It further decreed the guaranty contract of September 11, 1867, valid, and that under that guaranty contract the C., C., C. & I. Ry. Co, and its ally, the L., S. & M.

S. R. R. Co., as one guarantor, and the Penn. R. R. Co., as lessee of the P., Ft. W. & C. Ry., as another guarantor, should each pay, or be liable for, one-third part of the total amount found due.

It further enjoined the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. from receiving any money upon either principal or interest of the Indianapolis and St. Louis Railroad Company mortgage bonds held by them until full payment of the rent, for which they were decreed liable, was made. (Appendix pp. 6, 7.)

Attention is called to these features of the decree of July 26, 1882, to show clearly and beyond all question that this intervening petition was disallowed by the Circuit Court because that Court had already entered that decree and relied upon it as a protection of the rights and equities of the St. L., A. & T. H. R. R. Co., in the matter of moneys due to it from the Indianapolis and St. Louis Railroad Company, for the use of its road and equipment.

The decree of July 26, 1882, in so far as it affected the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., has been reversed by this Court, upon the ground that the Indianapolis and St. Louis Railroad Company had no power under the laws of Indiana to become the lessee of a railroad in another State; that the lease or operating contract was therefore *ultra vires* and void, and that, the lease being void, the guaranty contract was, of necessity, also void.

Penn. R. R. Co. et al. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290, 314.

The Indianapolis and St. Louis Railroad Company

did not appeal to this Court from the decree of July 26, 1882, by which it was decreed to pay to the St. L., A. & T. H. R. R. Co. $664,874.70 for rent then due and unpaid. That decree, as against the Indianapolis and St. Louis Railroad Company, remains in full force.

Penn. R. R. Co. et al. v. *St. L., A. & T. H. R' R. Co.*, 118 U. S. 318.

The amount found and decreed due from the Indidianapolis and St. Louis Railroad Company to the St. L., A. & T. H. R. R. Co. by the decree of July 26, 1882, was, in open court, agreed to be correct by all the parties to that decree, and the agreement was embodied in the decree. (Appendix, p. 3.)

14. From the time the Penn. R. R. Co. disposed of its Indianapolis and St. Louis Railroad Company mortgage bonds to the C., C., C. & I. Ry. Co., the C., C., C. & I. Ry. Co. became the owner of substantially all of the Indianapolis and St. Louis Railroad Company second and third mortgage bonds. The second mortgage bonds are one thousand in number of $1,000 each, par value. Of these the C., C., C. & I. Ry. Co. holds 853 bonds. Of the remaining 107 bonds 94 are in the second mortgage bond sinking fund, leaving only 13 second mortgage bonds outstanding not owned by the C., C., C. & I. Ry. Co.

The third, or equipment mortgage bonds, are 500 in number of $1.000 each, par value.

Of these the C., C., C. & I. Ry. Co. holds 498 bonds, leaving only two bonds outstanding not owned by the C., C., C. & I. Ry. Co. (Record, pp. 73 and 71.) The foreclosure and sale of the property and franchises of

the Indianapolis and St. Louis Railroad Company was upon these two mortgages. For the $1,500,000 par value of bonds secured by these two mortgages, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. originally paid the Indianapolis and St. Louis Railroad Company $1,188,000, the discount on the $1,000,000 of second mortgage bonds being $250,000, and the discount on the $500,000 par value of the equipment bonds being $62,000. (Record, p. 51.)

This fact ought to be remembered in considering the equities in this case as existing between the respective claimants here asking payment out of the proceeds of the foreclosure sale.

The two claimants against this fund in Court are the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co. The contest to be decided by this Court in its decision upon this appeal is between these two claimants. The St. L., A. & T. H. R. R. Co. asks that part of this fund may be applied in payment of the amount justly due for the use of its railroad by the Indianapolis and St. Louis Railroad Company, as a connecting line, the possession and use of which enabled the Indianapolis and St. Louis Railroad Company to make a very large proportion of all the earnings it ever made.

The C., C., C. & I. Ry. Co. is asking that nothing be paid to the St. L., A. & T. H. R. R. Co. for the use of its railroad, and that all of this fund shall be applied to the payment of the Indianapolis and St. Louis Railroad Company mortgage bonds held by it, which bonds were originally taken by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. as lessee of the P., Ft. W. & C. Ry.

Co., at a ruinous discount, from the corporation created by them for the express purpose of becoming lessee of the St. L., A. & T. H. R. R., under their solemn written promise that if the St. L., A. & T. H. R. R. Co. would accept the corporation so created by them as lessee they would see to it that the lessee, created by them, faithfully performed all the requirements of the lease.

It is true that the legal obligation of that promise is absolved by the decision of this Court in holding that the lease, which was the cause of the organization of the Indianapolis and St. Louis Railroad Company, was itself invalid, and that the promise of this bondholder, the C., C., C. & I. Ry. Co., fell with the lease. But no one can know the history of this whole transaction without being fully convinced that the moral and equitable obligation remains.

It can not be improper to consider these features of the case, and the peculiar relation which this bondholder sustains, to both the Indianapolis and St. Louis Railroad Company and the St., L. A. & T. H. R. R. Co., in weighing the equities between the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co. as claimants against the fund in Court. As an evidence that the lease was then believed to be perfectly valid, and was regarded as constituting a valuable part of the assets and rights covered by the mortgage of the Indianapolis and St. Louis Railroad Company, attention is called to the following clause of the foreclosure decree procured by Hurlbut, Trustee. It should also be remembered that Hurlbut, while Trustee in the second and third mortgages of the Indianapolis and St. Louis Railroad Company, was also Vice Presi-

dent of the C., C., C. & I. Ry. Co., the owner of the bonds secured by the mortgages in which he was Trustee. The clause of the decree referred to is as follows:

"And it is further ordered by the Court that the premises and property so mortgaged and to be sold subject to the amount due upon said mortgage securing two thousand bonds of one thousand dollars each and interest due upon the same, is described as follows, to-wit: * * * including the lease executed by the St. Louis, Alton and Terre Haute Railroad Company of its line of railroad as described in said lease to said Indianapolis and St. Louis Railroad Company and hereinafter mentioned, with the right to operate said leased line of road in accordance with and upon the terms and conditions of said lease." (Appendix, pp. 20, 21.)

15. The superb good faith of the C., C., C. & I. Ry. Co. in contending, in the former appeal to this Court, against the enforcement of the lease and guaranty contract, on the ground that they were *ultra vires* and therefore void, is made strikingly apparent by the fact that while that litigation was pending the C., C., C. & I. Ry. Co. and the reorganized Indianapolis and St. Louis Railway Company, as "*successor of the Indianapolis and St. Louis Railroad Company, by purchase at the judicial sale of its property and franchises* AND ITS RIGHTS AS LESSEE," executed and entered into a new lease of the St. L., A. & T. H. R. R. for ninety-nine (99) years from and after November 1, 1882, in which new lease THEY CONTRACT TO PAY THE SAME MINIMUM RENT PROVIDED BY THE LEASE OF SEPTEMBER 11, 1867, VIZ: $450,000 PER ANNUM, PAYABLE IN MONTHLY PAYMENTS OF $37,500, and in

addition agreed to expend large sums of money in making permanent improvements and betterments upon the leased line.

The entire new lease is substantially the same as the old lease. Both are set forth in the record of this appeal.

(New lease, Record, pp. 55 to 65.)

(Old lease, Record, pp. 11 to 27.)

Would the C., C., C. & I. Ry. Co., its officers, managers and counsel have executed this new lease if they, in good faith, believed the old lease and all the contracts relative thereto, to be *ultra vires* and therefore void? Of course this new lease is equally void with the old lease.

This new lease is not referred to as a valid instrument. Under the law, as established by the decision of this Court on the former appeal, it is invalid, because the lessee companies, as corporations of Indiana, had no power to make such a contract, and no lapse of time, or ratification by stockholders, can ever give it validity.

Nevertheless, this instrument is worthy of careful consideration in considering the equities presented by this appeal.

First. Because it fixes and measures the actual value, upon *quantum meruit*, of the use and possession of the St. L., A. & T. H. R. R. to the C., C., C. & I. Ry. Co. and the Indianapolis and St. Louis Railway Company as their connecting line and western outlet AS DETERMINED BY THEMSELVES.

Second. Because, taken in connection with the litigation touching the old lease, it well illustrates the quality and character of the faith exercised by the C.,

C., C. & I. Ry. Co. concerning its written pledges, upon the faith of which it induced the St. L., A. & T. H. R. R. Co. to enter into the lease and yield the possession and use of its railroad and franchises to the Indianapolis and St. Louis Railroad Company.

It is a maxim, hallowed by age and countless judicial decisions, that he who comes into a Court of equity must come with clean hands and show that he has done and is doing equity.

The St. L., A. & T. H. R. R. Co. challenges the closest scrutiny of every act performed by it throughout this entire transaction, the close of which is now to be considered by this Court. It has acted in perfect good faith, keeping every promise to the letter. Can the C., C., C. & I. Ry. Co. say that?

Its answer to this intervening petition shows that it is here pleading *ultra vires* to, and denying the validity of, every contract ever signed by its officers in any way touching or affecting the lease of September 11, 1867. (Record pp. 35, 36, 37.)

The original operating contract and first guaranty contract of May 17, 1867, the lease and guaranty contract of September 11, 1867, and the contract of May 1, 1869, between the C., C., C. & I. Ry. Co. and the P., Ft. W. & C. Ry. Co., are each now claimed to be *ultra vires* although it is too plain for controversy that the C., C., C. & I. Ry. Co. regarded each of these contracts as valid and acted them out until it conceived the idea that it could better its condition by violating them. It is equally plain that the St. L., A. & T. H. R. R. Co. in good faith yielded possession of its railroad and equip-

ment and permitted them to remain in the use and possession of the Indianapolis and St. Louis Railroad Company, relying upon these contracts.

But counsel for the C., C., C. & I. Ry. Co. will say that this Court has held the lease invalid, and that that ends the matter. It is true this Court has held the lease invalid. But is it not also true that this Court, as a Court of equity, will consider all these circumstances and the acts of the parties, in determining upon a just and equitable distribution of the fund in Court as between the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co.?

It is certainly true that the Indianapolis and St. Louis Railroad Company, and through it, the C., C., C. & I. Ry. Co., as chief bondholder and owner of the Indianapolis and St. Louis Railroad Company, had the use and benefit of the St. L., A. & T. H. R. R. for many months, *for which not a penny of rent has been paid*, while for many other months only partial payment of rent has been made. It is certainly true that the possession and use of the St. L., A. & T. H. R. R. was of value to the Indianapolis and St. Louis Railroad Company, and, through it, was valuable to its chief bondholder and owner, the C., C., C. & I. Ry. Co.

It is also certainly true that the St. L., A. & T. H. R. R. Co. will never receive any of this rent due and unpaid, unless it receives it out of the fund in Court, and that if the C., C., C. & I. Ry. Co., as the holder of substantially all of the second and third mortgage bonds is permitted to take this fund, it will thereby be getting money that in equity belongs to the St. L., A. & T. H.

R. R. Co. Can a Court of equity make a distribution that would produce such an inequitable result?

ARGUMENT.

I.

The St. Louis, Alton, and Terre Haute Railroad Company is entitled to payment of the amount equitably due for the use of its railroad and franchises by the Indianapolis and St. Louis Railroad Company, as upon quantum meruit, regardless of the lease of September 11, 1867.

Even if the lease had been held void on account of *fraud*, equity would require that the St. L., A. & T. H. R. R. Co. should be paid the amount justly and equitably due for the use of its railroad and franchises while possessed and used by the I. & St. L. R. R. Co.

The case of *Thomas* v. *Brownville, etc. R. R. Co.*, 109 U. S. 522, 526, seems conclusive upon this point.

In that case the company entered into a construction contract and issued its mortgage bonds to the construction contractors. Suit was brought to foreclose the mortgage. Certain stockholders intervened, and, by way of answer and cross-bill, charged that the construction contract was fraudulent and void and that, therefore, the mortgage bonds issued and delivered under the construction contract were void. The Circuit Court held the construction contract void and the bonds issued in fulfillment of it void, and dismissed the bill. This Court, while concurring with the Circuit Court that the contract was void for fraud, reversed the decree on the ground that although the contract was fraudulent and therefore void, the contractors

were in equity entitled to payment, as upon *quantum meruit*, for the work of construction actually performed. In the opinion reversing the decree in favor of the stockholders, Mr. Justice Miller said:

"It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other terms would be unjust, and would make the Court the instrument of this injustice."

In *Gardner* v. *Butler*, 30 N. J. Eq. (3 Stewart), 710, 724, the Court below said:

"He who would have equity must do equity. If the contracts made with those firms are to be held void, it must be on terms that they shall be allowed reasonable compensation for the services rendered by them."

The Court of Errors and Appeals, in a decision unanimously affirming the decree of the lower Court, said:

"The contract will not be regarded, but the services having been rendered, and the company having received the benefit of them, it would be manifestly inequitable to deny to the Trustee a fair equivalent for them. It would pervert a rule of law which is intended to guard against fraud and injustice."

In *Wardell* v. *The Union Pacific Railroad Co.*, 4 Dillon 339, the Circuit Court, after rejecting the contract involved in the litigation as fraudulent, and therefore void, said:

"By what rule shall we measure Mr. Wardell's rights? He has spent time and labor and money in discovering the mines and placing them in condition to be profitably worked. * * * Apart from the contract and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to this without just compensation."

This precise ruling was affirmed by this Court on appeal in the same case.

Wardell v. *Union Pacific R. R. Co.*, 103, U. S. 656.

Since it is settled law that Courts of Equity will require payment, as upon *quantum meruit*, for services rendered or benefits received under contracts held void for fraud, most certainly Courts of Equity must require payment, as upon *quantum meruit*, for services rendered or benefits received under a contract in which no suspicion or trace of fraud appears, but which is held void solely on account of lack of power upon the part of one of the contracting parties to enter into such a contract. Contracts conceived in fraud and entered into with fraudulent intent are *malum in se*. While contracts, void simply because they are *ultra vires* are not *malum in se*, but merely *malum prohibitum*. No taint of fraud or wrongful purpose attaches to them.

As between the St. L., A. & T. H. R. R. Co. and the Indianapolis and St. Louis Railroad Company this question does not arise, because the decree of July 26, 1882, decreeing the Indianapolis and St. Louis Railroad Company to pay $664,874.70 to the St. L., A. & T. H. R. R. Co. for rent due and unpaid, stands, and remains in

full force. The Indianapolis and St. Louis Railroad Company has prosecuted no appeal from that decree.

But it may be claimed that as between the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co., as contending claimants for payment of their respective claims out of the proceeds of the sale of the railroad and franchises of the Indianapolis and St. Louis Railroad Company, the question does arise whether the St. L., A. & T. H. R. R. Co. is entitled to payment for the use of its road, as upon *quantum meruit*, notwithstanding the fact that the lease has been held void.

This claim will probably be based upon a sentence found in the decision of this Court upon the former appeal in this litigation. In the opinion Mr. Justice Miller said:

"We do not decide the question whether the Indianapolis and St. Louis Railroad Company can not be compelled to pay the plaintiff for the use of its road, though the contract be void. Whether it would be so liable on a *quantum meruit* admits of doubt. It is unnecessary to decide this, because that company has submitted to the decree of the Circuit Court in favor of plaintiff for that rent by failing to give bond and perfecting the appeal from that decree."

Penn. Co. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 318.

In the light of the very clear announcement of the law as given in the decisions of this Court above cited, it is exceedingly difficult, if not impossible, to comprehend where, or how, or why a doubt can arise as to the legal and equitable liability of the Indianapolis and St.

Louis Railroad Company to pay a just and fair compensation for the use of the railroad and franchises of the St. L., A. & T. H. R. R. Co.

Even if the lease had been entered into by the St. L., A. & T. H. R. R. Co., corruptly and fraudulently, upon well established principles of equity jurisprudence, fully sanctioned and confirmed by decisions of this Court, the Indianapolis and St. Louis Railroad Company would be liable to pay a just compensation for the use of the leased railroad while possessed and used. But in this case there is no wrong, no fraud, no corruption upon the part of the St. L., A. & T. H. R. R. Co. This Court has expressly held that it had full power and authority by the laws of Illinois, the State giving it corporate existence, to enter into this very lease.

Penn. R. R. Co. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 309.

No wrongful, unlawful or bad faith act can be imputed to the St. L., A. & T. H. R. R. Co. in this entire transaction. It has kept its promises and performed its contract. It has never plead *ultra vires* for the purpose of evading its written pledges. Its only fault in this entire transaction is that it relied upon the actual possession by the Indianapolis and St. Louis Railroad Company of the power it assumed to possess to enter into the contract of lease as lessee, and it had faith in the written contracts and pledges of the C., C., C. & I. Ry. Co. and its associate companies.

The Indianapolis and St. Louis Railroad Company, and, through it, the C., C., C. & I. Ry. Co. as its chief stockholder and owner, had the use of the railroad and fran-

chises of the St. L., A. & T. H. R. R. Co. and received all the benefits and advantages of connecting their line of transportation with St. Louis instead of ending it at Terre Haute. That this use, and the advantages derived from it, were valuable to the Indianapolis and St. Louis Railroad Company and to its chief owner, the C., C., C. & I. Ry. Co., has already been demonstrated. It is admitted that this use has not been fully paid for, but that a large amount remains unpaid.

The St. L., A. & T. H. R. R. Co. now asks this Court for payment of the amount justly due to it out of the only fund from which any payment can ever be secured. Can a Court of Equity say that it ought not to receive a fair and just compensation for the use of its railroad?

II.

The amount of compensation for the use of the railroad and franchises of the St. Louis, Alton and Terre Haute Railroad Company by the Indianapolis and St. Louis Railroad Company fixed by the lease of September 11, 1867, to-wit: $450,000 per annum, in monthly payments of $37,500. is no more than a just and equitable compensation and should be allowed, as upon quantum meruit, regardless of the lease.

As between the Indianapolis and St. Louis Railroad Company and the St. L., A. & T. H. R. R. Co. this amount is established by the decree of July 26, 1882, and cannot now be questioned by the Indianapolis and St. Louis Railroad Company.

Upon the supposition that as between the C., C., C. & I. Ry. Co., as principal bondholder, and the St. L., A.

& T. H. R. R. Co., as claimant for unpaid rent, it may be claimed that the decree of July 26, 1882, is not binding as a measurement of the amount justly due for the use of the leased railroad: The St. L., A. & T. H. R. R. Co. here affirms that the amount fixed by the lease and by the decree of July 26, 1882, is no more than a fair and just compensation for the use of the leased property upon a *quantum meruit*, and that the C., C., C. & I. Ry. Co., as owner of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company is not in a position to deny or question the correctness and justness of the amount claimed.

1. The C., C., C. & I. Ry. Co. was one of the principal parties in procuring the St. L., A. & T. H. R. R. Co. to execute the lease of September 11, 1867, and deliver the possession of its railroad and franchises to the Indianapolis and St. Louis Railroad Company, and was the largest beneficiary by the connection and through line thus obtained. When it procured the execution of the lease the C., C., C. & I. Ry. Co. well knew its necessity to have a western outlet and connecting line between Indianapolis and St. Louis, and well understood the value to it of such a connection. It agreed to the justness and fairness of the compensation fixed by that lease. While the C., C., C. & I. Ry. Co. was not a party to the lease of September 11, 1867, in the sense of being a signer to that lease, still, in the light of the history of this transaction, it would be worse than idle to claim that the C., C., C. & I. Ry. Co. was not a potential actor in the procurement of the execution of that lease, and, in order to procure it, joined with its associate compan-

ies in the execution of the guaranty contract of September 11, 1867, which guaranty contract was held void by this Court because the lease it professed to guarantee was itself void. The fact that that lease has been held void, after it had remained in force for fifteen years, solely on the ground that the Indianapolis and St. Louis Railroad Company, created by the C., C., C. & I. Ry. Co. and its associate companies for the express purpose of its becoming lessee in that lease, had no power to accept the lease and become lessee under it, does not prevent, or even tend to prevent, a Court of Equity from considering that lease and the amount of compensation fixed by it in determining what would be a fair and just compensation for the use of the leased property upon *quantum meruit*.

The decree of July 26, 1882, is based upon the amount of rent found due to the St. L., A. & T. H. R. R. Co. upon the basis of compensation fixed by the lease of September 11, 1867. The C., C., C. & I. Ry. Co. was a party to that decree and in open Court agreed to the correctness of the amount then found and decreed to be due. (Appendix p. 3.)

2. The C., C., C. & I. Ry. Co. has, by its written contract, pledge and declaration made February 23, 1883, while this litigation was pending in the Circuit Court, reaffirmed, sanctioned and declared $450,000 per annum in monthly payments of $37,500, to be a just and fair compensation for the possession and use of the railroad and franchises of the St. L., A. & T. H. R. R. Co., extending from Terre Haute to St. Louis, with branch to Alton.

On February 23. 1883, while contending in this Court that the lease of September 11, 1867, and all the contracts made relative thereto, without exception, were *ultra vires* and therefore void, the C., C., C. & I. Ry. Co., in connection with the reorganized Indianapolis and St. Louis Railway Company, entered into a new contract of lease with the St. L., A & T. H. R. R. Co., covering precisely the same property conveyed by the lease of September 11, 1867, by which new lease they covenanted and agreed to pay to the St. L., A. & T. H. R. R. Co. for the possession and use of its said railroad and franchises PRECISELY THE SAME MINIMUM RENT FIXED BY THE LEASE OF SEPTEMBER 11, 1867, to-wit: $450,000 per annum, in monthly payments of $37,500, and, in addition thereto, further covenanted and agreed to expend large sums of money in making improvements and betterments upon said leased property. (Record pp. 55 to 62.)

This new lease certainly determines the fair and just value of the use of this leased property to the C., C., C. & I. Ry. Co., *itself being the judge as to that value.* With this new written declaration of actual value before it, will a Court of Equity permit the C., C., C. & I. Ry. Co. to deny or question the justness or fairness of the amount claimed by the St. L., A. & T. H. R. R. Co. for unpaid rent? This new lease is not referred to as a valid contract. Under the decision of this Court it is absolutely void. But it is referred to as clearly demonstrating that the amount here claimed by the St. L., A. & T. H. R. R. Co. is no more than just compensation for the use of its leased property, and is the amount that would be decreed due upon *quantum meruit* if no lease had ever been executed.

3. The record in this appeal furnishes abundant proof that the amount of rent fixed by the lease of September 11, 1867, is no more than a Court of Equity would allow upon a *quantum meruit* if the written lease had never existed.

It is very certain that the possession and use of this leased line and its franchises was worth far more to the Indianapolis and St. Louis Railroad Company, and to its chief owner, the C., C., C. & I. Ry. Co., than merely the surplus earnings of the leased line, *earned on its own track*, left after paying the operating and maintenance expenses of the leased line out of its gross earnings. The C., C., C. & I. Ry. Co. and the Indianapolis and St. Louis Railroad Company wanted a connection with St. Louis, and wanted to so control that connection as to turn the tide of traffic eastward from St. Louis and westward to St. Louis *over their own lines*. This procurement and control of business for their own lines constituted the chief element of value to them of the exclusive use and possession of the leased property. They were willing to pay something for this control of a line that would enable them to reach St. Louis and command a fair share of the business coming from and going to that railroad center and distributing point. The C., C., C. & I. Ry. Co. and the Indianapolis and St. Louis Railroad Company would have been paralized and comparatively worthless without control of a line connecting Terre Haute and St. Louis.

By the terms of the lease 30 per cent. of the gross earnings of the leased line, *earned on its own track*, was expressly set apart to be applied on payment of rent,

and in the event that this 30 per cent. of gross earnings of the leased line, on its own track, was not sufficient to equal $37,500 per month, the deficit was to be paid by the Indianapolis and St. Louis Railroad Company. By this agreement the Indianapolis and St. Louis Railroad Company received 70 per cent. of all the gross earnings of the leased line with which to pay the operating and maintenance expenses of the leased line. If the operating and maintenance expenses of the leased line did not consume all of the 70 per cent. the Indianapolis and St. Louis Railroad Company pocketed the surplus and applied it to its own benefit.

Poor's Railroad Manual shows that the average operating and maintenance expenses of all the railroads in the United States is only 61.8 per cent. of their gross earnings. Kirkman, in his work on railway expenditures, says that if operating and maintenance expenses consume any more than 64 per cent. of gross earnings, something is radically wrong in the management. Tested by either of these rules, the leased line alone made gross earnings enough to have paid all of its operating and maintenance expenses and the full amount of rent stipulated for in the lease.

In order to secure exclusive control of this line connecting their lines with St. Louis,—a connection that was a vital necessity to them,—the Indianapolis and St. Louis Railroad Company, and, through it, its owners, the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., assumed two risks, viz: (1) That 30 per cent. of the gross earnings of the leased line, earned on its own track, might not be sufficient to pay the full $37,500 per month.

(2) That 70 per cent. of the gross earnings of the leased line might not be sufficient to pay the operating and maintenance expenses of the leased line.

If 30 per cent. of the gross earnings of the leased line amounted to $37,500 per month, or $450,000 per annum, and if the operating and maintenance expenses of the leased line did not exceed 70 per cent. of its entire gross earnings, they would get their connection between Terre Haute and St. Louis, and all benefits and advantages that that connection brought with it, FOR NOTHING. If 30 per cent. of the gross earnings of the leased line did not amount to $37,500 per month, the deficiency measured the actual cost to them of possessing and controlling a line connecting Terre Haute with St. Louis.

With these facts in view, an analysis of some of the exhibits in the record will show conclusively that if the full rent had been paid for the entire fifteen years from June 1, 1867, to May 23, 1882, the Indianapolis and St. Louis Railroad Company would only have been required to pay a very small sum for its connecting line from Terre Haute to St. Louis, compared with the pecuniary benefits realized by the Indianapolis and St. Louis Railroad Company from its possession and control of the leased line.

Fifteen years' rent at $450,000 per annum amounts to $6,750,000. The gross earnings of the leased line *on its own track*, during the fifteen years from June 1, 1867, to May 23, 1882, were $20,104,885.38. (Record p. 65, Exhibit "K", p. 76, Exhibit "Q".) Thirty per cent. of this aggregate amount of gross earnings is $6,031,465.61. This shows that the total difference between the mini-

mum rent fixed by the lease and thirty per cent. of the gross earnings of the leased line on its own track for the entire period of fifteen years,—lacking eight days,—is only $718,534.39, making an average annual deficiency for the fifteen years of $47,902.29. That is, the leased line made such earnings on its own track that 30 per cent. of the gross earnings were enough to have paid all of its minimum rent of $450,000 per annum, excepting only an average yearly deficiency of $47,902.29; but it has not paid this minimum rent. If it had, the St. St. L., A. & T. H. R. R. Co. would not be here asking further payment.

Does any one believe that the possession and use of this line from Terre Haute to St. Louis was not worth more than $50,000 per annum to the Indianapolis and St. Louis Railroad Company and its chief owner and bondholder, the C., C., C. & I. Ry. Co.? Five times $50,000 per annum would be cheap in comparison with the pecuniary benefits derived each year from the possession and use of the leased line.

It is shown above that the total difference between the minimum rent as provided for by the lease and 30 per cent. of the gross earnings of the leased line for fifteen years is $718,534.39. But this statement is not fair to the St. L., A. & T. H. R. R. Co. The record shows that from June 1, 1867 to July 1, 1870, while the Indianapolis and St. Louis Railroad was being built, and before it was opened for business—before a car load of merchandise ever rolled over its track—the Indianapolis and St. Louis Railroad Company received large sums of money from the net surplus earnings of

the line leased by it from the St. L., A. & T. H. R. R. Co., after paying out of the gross earnings of the leased line all of its operating and maintenance expenses and more than the full minimum rent provided by the lease. (Record p. 76, Exhibit "Q".)

The first seven months under the lease,—from June 1, 1867, to January 1, 1868, shows an apparent deficit of $146,933.89, but this is not a deficiency in fact. Thirty per cent. of the gross earnings of the leased line during the same seven months came to more than $37,500 per month. The apparent deficiency set forth in the Exhibit arises from the fact that during that seven months the lessee, the Indianapolis and St. Louis Railroad Company, expended over eighty per cent. of the gross earnings of the leased line in making betterments and additions to the leased property, which betterments and additions it was, by the lease, required to make at its own expense.

During the years 1868, 1869, 1870 and 1871, as shown by this same exhibit, the Indianapolis and St. Louis Railroad Company received in cash, as net clear profit, from its leased line, after the earnings of the leased line had paid all operating and maintenance expenses, and all rent as provided by the lease, the sum of $290,633.88. (Record p. 76.)

Every dollar of this net surplus earnings of the leased line went directly into the treasury of the Indianapolis and St. Louis Railroad Company, and was applied to its benefit. Any just computation, therefore, requires that this $290,633.88 should be subtracted from the total deficiency or difference between 30 per cent. of the gross

earnings of the leased line and the minimum rent provided by the lease for the entire fifteen years. This difference or deficiency was above found to be $718,534.39. Subtracting from this amount the $290,633.88, net surplus earnings of the leased line received by the Indianapolis and St. Louis Railroad Company, as above shown, leaves only $427,900.51 as the total deficiency during the fifteen years. That is, the 30 per cent of the gross earnings of the leased line for the fifteen years and the surplus net earnings of the leased line received by the Indianapolis and St. Louis Railroad Company, as shown above, added together only lack $427,900.51 of being equal to the full minimum rent of $37,500 per month for the fifteen years. Hence this $427,900.51 represents all that the leased line would have actually cost the Indianapolis and St. Louis Railroad Company during the fifteen years if it had paid the full minimum rent for the whole period.

But it has not paid the minimum rent in full. The amount of minimum rent now due to the St. L., A. & T. H. R. R. Co., payment of which it is here asking, largely exceeds $427,900.51.

Hence it is plain that unless this claim of the St. L., A. & T. H. R. R. Co. is decreed to be paid out of the fund in Court, the Indianapolis and St. Louis Railroad Company and its owner, the C., C., C. & I. Ry. Co., will have had the use of the leased line for the fifteen years without any actual cost to them, and will, in addition, be permitted to make large pecuniary profit off from the leased line.

A careful study of this same Exhibit "Q," (Record, p. 76,) introduced in evidence by the C., C., C. & I. Ry.

Co., will clearly demonstrate that our position and computations above set forth are correct. This Exhibit shows an apparent deficit of $1,174,086.17 during the entire fifteen years. But this deficit does not arise from payment of minimum rent provided by the lease. It arises from exorbitant charges made by the lessee against the leased line for operating expenses. During this fifteen years no construction account or new equipment account was kept by the lessee *as to its leased line*, but everything was charged to operating expenses. By the contract the lessee was to provide, at its own expense, any additional equipment needed, and any new construction found necessary to accommodate the traffic. The lessee did not do this. It rented cars instead of buying them, and charged the rent of the cars to the leased line as part of its operating expenses. If any new construction work was done on the leased line it was all charged to operating expenses of the leased line. In this way the operating expense account of the leased line was swelled to nearly 75 per cent. of the entire gross earnings of the leased line, although, as above shown, by the best authorities on the subject, 64 per cent. of gross earnings is the utmost that can be consumed in operating expenses under fair and just management.

By the lease the Indianapolis and St. Louis Railroad Company was to have 70 per cent. of the gross earnings of the leased line out of which to pay its operating expenses. Seventy per cent. of the gross earnings of the leased line, earned on its own track, during the fifteen years,—that is, 70 per cent. of $20,104,885.38,—is $14,073,419.76, but Exhibit "Q" shows that the Indianapo-

lis and St. Louis Railroad Company charged against its leased line, for operating expenses during the fifteen years, $14,814,102.86, which is $740,682.60 more than the entire 70 per cent. of gross earnings. Therefore $740,682.60 of this apparent deficit arises from exorbitant overcharges to operating expenses. Again, from June 1, 1867, to January 1, 1871,—the period during which the Indianapolis and St. Louis Railroad Company built its railroad,—the leased line made such an amount of gross earnings that 30 per cent. thereof came to more than $37,500 per month. For this period the St. L., A. & T. H. R. R. Co. therefore received more than $37,500 per month as rent. This excess during these four years amounts to $252,032.52. In this Exhibit the Indianaplis and St. Louis Railroad Company claims credit for having paid this excess of rent and swells the apparent deficit by just that amount. The Indianapolis and St. Louis Railroad Company never paid a penny of this excess. Every dollar of it was earned *on the track of the leased line* over and above paying all operating expenses and the minimum rent. And, besides this, during this same period the Indianapolis and St. Louis Railroad Company pocketed and applied to its own benefit $290,-633.88 of surplus net earnings of the leased line,—as proved by this same Exhibit,—although during three and a half years out of this same four years the railroad of the Indianapolis and St. Louis Railroad Company from Indianapolis to Terre Haute was not constructed or open for use.

It is clear that in any just computation this item of $252,032.52, excess of rent above $37,500 per month,

ought not to be credited as a payment made by the Indianapolis and St. Louis Railroad Company. Instead of paying anything whatever for rent of the leased line during that period of four years, the Indianapolis and St. Louis Railroad Company made and received a clear net cash profit of $290,633.88 off from its leased line.

These two items, viz: $740,682.60 overcharges against the leased line for operating expenses, and $252,-082.52 excess of rent above $87,500 per month, earned by the leased line on its own track, make up $992,715.52 of the claimed deficit of $1,174,086.17 set forth in Exhibit "Q." This leaves only $181,370.65 as the actual deficit arising in fifteen years, as shown by a fair analysis of Exhibit "Q."

There is another view of this same point that is worthy of careful consideration in determining the fair value to the Indianapolis and St. Louis Railroad Company of the use of the leased line, upon *quantum meruit*.

Beginning with January 1, 1875, for several years thereafter the Indianapolis and St. Louis Railroad Company was in a pooling contract with the Vandalia line, by which St. Louis business was pooled between the two competing lines between St. Louis and Indianapolis. The Indianapolis and St. Louis Railroad Company received in net cash, under this pooling contract, $322,-396.77, AND DID NOT GIVE THE LEASED LINE CREDIT FOR A SINGLE DOLLAR OF THE AMOUNT. The testimony of Russell Elliott, Auditor of the Indianapolis and St. Louis Railroad Company, proves this beyond doubt or question. This evidence appears on page 217 of the printed record of the former appeal. It was introduced in evi-

dence under this intervening petition. (Record, p. 46.) By stipulation it was not reprinted in the record of this appeal. (Record, p. 93.) The testimony of Auditor Elliott upon this point is as follows:

"Q. Are there any other items of earning of any kind on the leased line that are not included in the gross earnings?"

"A. I think some of the earnings received from the pool with the Vandalia, and other pooling contracts, were not divided up. I do not know exactly how much, but I can make a statement of it."

"Q. Please make a statement of the amount received from the Vandalia pool and other pooling contracts that was not included in the gross earnings, and make the same a part of the answer to this question."

"A. It was not reported in gross earnings. The following statement shows the balance under the Vandalia pool, and other pooling contracts, showing a final balance of $822,896.77, PAYMENTS TO THE INDIANPAOLIS AND ST. LOUIS RAILROAD COMPANY IN WHICH THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY HAVE NOT PARTICIPATED."

Not one dollar of this $822,896.77 was ever credited to the leased line, *although every dollar of it was received by the Indianapolis and St. Louis Railroad Company, because it possessed and controlled the leased line from Terre Haute to St. Louis.*

How could the Indianapolis and St. Louis Railroad Company have gotten into a pooling contract regarding St. Louis business if it had not possessed and controlled a line of road reaching St. Louis? The Indianapolis

and St. Louis Railroad from Indianapolis to Terre Haute is seventy-one miles in length. The leased line from Terre Haute to St. Louis is one hundred and eighty-nine miles in length,—the Alton branch being four miles in length. If this money received from the pooling contract had been honestly and justly divided between the Indianapolis and St. Louis Railroad proper and its leased line on a mileage basis, the leased line would have received credit for $234,856.22, while the Indianapolis and St. Louis Railroad proper would have received credit for $88,038.58.

Here then is $234,856.22 realized in cash and pocketed by the Indianapolis and St. Louis Railroad Company, *every dollar of which it received solely because of its possession and control of the leased line*, and every dollar of which should have been credited to the earnings of the leased line. In fact, every dollar of the entire $322,-896.77 was clear net profit to the Indianapolis and St. Louis Railroad Company realized from its possession and control of the leased line. This sum, properly credited to the earnings of the leased line, would wipe out the remainder of the claimed deficit set forth in Exhibit "Q". Is it true that the leased line was a dead weight on the Indianapolis and St. Louis Railroad Company? Is it not rather true that the leased line was of very great pecuniary benefit to the Indianapolis and St. Louis Railroad Company? Is it not true that the minimum rent fixed by the lease is a just and fair measure of the value to the Indianapolis and St. Louis Railroad Company of the use of the leased line and franchises upon *quantum meruit*?

There is one further consideration to be taken into account in measuring the value of the use of the leased line to the Indianapolis and St. Louis Railroad Company and its chief bondholder, the C., C., C. & I. Ry. Co.; and that is that the possession and control of the leased line enabled the Indianapolis and St. Louis Railroad Company to do an immense amount of business that it could not have procured or controlled if it had not possessed and controlled the leased line. To procure business eastward from St. Louis and westward from Indianapolis to St. Louis was the prime motive that caused the syndicate companies to procure the lease from the St. L., A. & T. H. R. R. Co. and afterwards caused them to create the Indianapolis and St. Louis Railroad Company and build the railroad from Terre Haute to Indianapolis.

This record contains a carefully prepared analysis of the business done and earnings made by the Indianapolis and St. Louis Railroad Company *on its own line*, for the eleven years from 1871 to 1881 inclusive. (Record pp. 85 to 88 inclusive.)

This analysis shows that largely more than half,—almost two-thirds,—of the entire earnings of the Indianapolis and St. Louis Railroad Company on its own line were derived from what is termed "foreign business," that is, business from the east going over the Indianapolis and St. Louis Railroad onto its leased line and destined to points west of Terre Haute, and business coming from the leased line onto the Indianapolis and St. Louis Railroad and destined to points east of Indianapolis.

It is perfectly plain that the Indianapolis and St.

Louis Railroad Company could not have procured and would not have controlled this foreign freight and passenger and mail and express business if it had not possessed and controlled the leased line from Terre Haute to St. Louis.

As a mere local road possessing and controlling no line connecting Terre Haute with St. Louis, the Indianapolis and St. Louis Railroad Company could not have made its ordinary operating expenses any year of its existence.

The procurement of this business *for itself* and turning it over to the C., C., C. & I. Ry. Co. for transportation eastward from Indianapolis constituted the largest element of the value of the control of the leased line to the Indianapolis and St. Louis Railroad Company and its chief bondholder and owner, the C., C., C. & I. Ry. Co.

In view of all these considerations, we feel confident that a Court of Equity will decide that the minimum rent fixed by the lease of September 11, 1867, is no more than a just compensation for the possession and use of the leased line upon a *quantum meruit* if no lease had ever existed. We think the record amply proves this. If it does not, the decree now appealed from should be reversed with directions to the Circuit Court to take additional evidence touching the fair value of the use and control of the leased line and its franchises and decree payment, out of the fund in Court, of the amount found due upon such further investigation.

III.

The St. Louis, Alton and Terre Haute Railroad Company is entitled to payment, out of the proceeds of the sale of

the railroad and franchises of the Indianapolis and St. Louis Railroad Company, of the full amount of the $664,874.70 decreed due to it from the Indianapolis and St. Louis Railroad Company by the decree of July 26, 1882, together with interest thereon from date of said decree, before any distribution of said proceeds of sale is made upon the second and third mortgage bonds, in preference to payment upon said second and third mortgage bonds.

The purpose of this argument thus far has been to show: *First.* That the St. L., A. & T. H. R. R. Co. is in equity entitled to a fair and just compensation for the possession and use of its railroad and franchises by the Indianapolis and St. Louis Railroad Company, notwithstanding the fact that the lease of September 11, 1867, has been held void, and: *Second.* That the minimum rent of $450,000 per annum, in monthly payments of $37,500, fixed by the lease, and upon the basis of which the decree of July 26, 1882, was rendered, is no more than a just compensation for the control and use of the railroad and franchises of the St. L., A. & T. H. R. R. Co. by the Indianapolis and St. Louis Railroad Company upon *quantum meruit*, regardless of the lease.

The proposition now presented is that the St. L., A. & T. H. R. R. Co. is entitled to payment of the amount justly and equitably due to it, out of the proceeds of the sale of the railroad and franchises of the Indianapolis and St. Louis Railroad Company, in preference to payment of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company.

It will be remembered that the C., C., C. & I. Ry. Co. owns substantially all of these second and third

mortgage bonds. The proceeds of sale are not sufficient to pay the debt due to the St. L., A. & T. H. R. R. Co. for the use of its railroad, and also to pay the full amount due on the second and third mortgage bonds. Hence this contest is narrowed down to a contention between the C., C., C. & I. Ry. Co., as bondholder, and the St. L., A. & T. H. R. R. Co. as claimant for money due for the use of its railroad.

The St. L., A. & T. H. R. R. Co. claims preference, in payment of the amount due it, over the second and third mortgage bonds held by the C., C., C. & I. Ry. Co. for three reasons:

First. BECAUSE THE AMOUNT JUSTLY DUE FOR THE USE BY THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY OF THE RAILROAD AND FRANCHISES OF THE ST. L., A. & T. H. R. R. CO. IS A PART OF THE OPERATING EXPENSES OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY.

Payment for the use of rented TRACK is just as much ordinary *operating expense* as is payment for the use of rented CARS. If not, why not? It would be unreasonable and unjust to say the rent of cars is an operating expense and payment for the services of the men who operated the rented cars is an operating expense, but payment for the use of rented track is not an operating expense.

The accustomed fairness and justness of the C., C., C. & Ry. I. Co. is happily illustrated by the position it assumes touching the proposition now under consideration. In its answer to the intervening petition in this case it says:

"This respondent denies that the earnings of the

St. Louis, Alton and Terre Haute Railroad were the property of the petitioner (the St. L., A. & T. H. R. R. Co.) after the execution of said lease; but avers that the petitioner was only entitled to have and receive from said defendant railroad company the rental agreed to by the terms of said lease, and avers that petitioner stood in the same attitude with reference to said rental as any other unsecured creditor of said defendant company."

(Record, p. 37.)

"This respondent further denies that the rental agreed to be paid by the Indianapolis and St. Louis Railroad Company constituted a part of the operating expenses of the Indianapolis and St. Louis Railroad Company."

(Record, p. 36.)

These two quotations show the exceeding equity with which the C., C., C. & I. Ry. Co. desires to conduct its transactions. By these two averments it, in effect, says: All the earnings made on the rented track belong absolutely to the Indianapolis and St. Louis Railroad Company and must go into its treasury, AS ITS EARNINGS, but payment for the use of the rented track on which these earnings were made is NOT an operating expense of the Indianapolis and St. Louis Railroad Company.

A Court of Equity will spurn such a proposition. It is abhorrent to justice.

The design of these averments of the answer of the C., C., C. & I. Ry. Co. is to put the payment for the use of the rented track,—upon which nearly three-fourths of all the earnings of the Indianapolis and St. Louis Rail-

Company were earned,—upon the footing of an ordinary unsecured floating debt, because it is well settled law that all operating expenses must be first fully paid out of gross earnings before there are any net earnings applicable to either interest or principal of mortgage bonds. Therefore the C., C., C. & I. Ry. Co., as owner of the mortgage bonds of the I. & St. L. R. R. Co., deems it essentially necessary to get this Court to hold that payment for the use of rented track is not an operating expense.

The enormity of this proposition is the more apparent when it is remembered that of the $26,868,252.31 gross earnings received by the Indianapolis and St. Louis Railroad Company (Record p. 78) $20,104,885.38 *were earned on the rented track.* (Record pp. 65, 76.)

The case of *Fosdick* v. *Schall*, 99 U. S. 235, is the leading case regarding railroad management and the adjustment of equities between different classes of claimants against insolvent railroad companies, and the proceeds of sale thereof under foreclosure sales. This case has been approved and confirmed by this Court many times, and is universally regarded as firmly establishing the law upon the various points by it decided. In the opinion, on page 252, Mr. Chief Justice Waite said:

"The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the

current receipts before he has any claim upon the income."

In *Union Pacific R. R. Co.* v. *United States*, 99 U. S. 420, 422, 423, this Court, speaking by Mr. Justice Bradley, said:

"As a general proposition, net earnings are the excess of the gross earnings *over the expenditures defrayed in producing them*, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof. * * * All payments of interest on the bonded indebtedness of the company should be charged to capital interest account, and not to current expenditures. Though payable out of earnings before any dividend can be made to stockholders, it can not be deducted for the purpose of ascertaining the 'net earnings' of the road, as that term is to be understood in the sixth section of the act. The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock; and the interest accruing thereon is in the nature of a dividend on such capital."

In *Union Trust Co.* v. *Walker*, 107 U. S. 596, Mr. Chief Justice Waite, in affirming the decree of the Court below requiring payment, out of the proceeds of sale, of claims accrued in the operation of the road by the company long prior to the foreclosure decree, said:

"We have no hesitation in answering this question in the affirmative. As was said in *Fosdick* v. *Schall*, 99 U. S. 235, 253, these creditors are paid not because they have in law a lien on the mortgaged property or the income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent, before any income arises which ought to be applied to the discharge of the mortgage debt."

In the case of *Union Trust Co* v. *Souther*, 107 U. S. 594, 595, this Court affirmed the decree of the Court below requiring the payment, out of the proceeds of the sale, of a claim for operating expenses accrued long prior to the Receivership, *even although the entire gross earnings prior to the appointment of the Receiver were not sufficient to pay operating expenses.*

In the case of *Miltenberger* v. *Logansport Ry. Co.*, 106 U. S. 313, this Court, speaking by Mr. Justice Blatchford, affirmed the decree of the Circuit Court directing payment, out of the proceeds of foreclosure sale, of the amount justly due for the use of a RENTED RAILROAD, and for dilapidation and wear of the rented railroad while held under the lease. The facts in that case were as follows: In June, 1872, the Logansport Railway Company rented the railroad from Rockville to Terre Haute, twenty-three miles in length, by a written

lease, the term of which was for one year and until one year's notice of its termination should be given by either party after that term. The rent fixed by the lease was $2,012.50, and the lessee was to maintain the road in as good condition as when received. The rented road remained in the possession of the company until the 26th day of August, 1874, at which time a Receiver was appointed. The rent for the rented road was paid up to September 1, 1874, by the Logansport Railway Company. During the first year of the Receivership no rent was paid. Rent was then paid for four months. After that four months the rent was unpaid up to August 12, 1876. After the last named date the rent was promptly paid until the foreclosure sale took place, which was in August or September, 1879. The Evansville Company, lessor of the leased road, filed an intervening claim for the unpaid rent and the amount of depreciation of the rented road. The Master first reported the amount due as $56,036.21. On exceptions to that report the Court directed the Master to ascertain what would be a fair rental value for the use of the leased property by the Receivers and to take into consideration any dilapidations. On this basis, and on new evidence, the Master reported in favor of the lessor company for unpaid rent and dilapidation $85,818.62, which amount the Circuit Court decreed should be paid out of the proceeds of sale in preference to any payment upon the mortgage bonds. In affirming the decree of the Court below Mr. Justice Blatchford said:

"We see no valid objection to this allowance. It is on the basis, not of the lease, but of the actual value

of the use of the property used by the Receivers, with the clear assent, under the circumstances, of all parties interested, which use the first-mortgage bondholders and their trustee, chargeable with full knowledge, never sought to prevent, such use being founded on the lease, which was property in the hands of the mortgagor. The line was used for the benefit of the mortgagor's road and of the holders of the bonds under the mortgages, with their acquiescence. Whatever the Court would have done, as an original question, if called on to determine whether the receiver should use and run the Evansville road, these applicants must now be held, in view of all the facts, to have consented to treat the right to run that road, and take its income, as if that were a part of the mortgaged property. This leads to the allowance, also, of the claims for operating supplies and materials, including steel rails, furnished for that road while so run."

It will be seen at a glance that this decision is exactly applicable to the case at bar in every respect. That this mortgage bondholder, the C., C., C. & I. Ry. Co., had full knowledge that the Indianapolis and St. Louis Railroad Company was using the leased line from Terre Haute to St. Louis, and that as such chief bondholder the C., C., C. & I. Ry. Co. consented to and fully approved of such use, and that the right to use the leased line was regarded by this bondholder and its Trustee, who was Vice President of the C., C., C. & I. Ry. Co., as a part of the mortgaged property, and as a valuable property covered by the mortgage, is clearly evidenced by the foreclosure decree procured by the Trus-

tee representing the C., C., C. & I. Ry. Co. In that decree it was expressly provided that the lease executed by the St. L., A. & T. H. R. R. Co. to the Indianapolis and St. Louis Railroad Company, and the right to operate the leased line, should be sold as part of the mortgaged estate. (Appendix pp. 20, 21.)

In *Sage* v. *Central Railroad Co.*, 99 U. S. 336, 345, 346, this Court affirmed the ruling of the Circuit Court regarding payments of *rent of cars* used upon the road.

In *Burnham* v. *Bowen*, 111 U. S. 776, the claim of Bowen for coal furnished for the operation of the railroad a year or more before the commencement of foreclosure proceedings was held to be a preferred lien upon the *corpus* of the mortgaged estate, and a sale was ordered if the claim was not paid, although it appeared "that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business." These authorities clearly decide the following points:

1. That all earnings are applicable, first, to operating expenses until they are fully paid, and that there are no net earnings applicable to bond interest or improvement of the mortgaged estate while operating expenses remain unpaid.

2. That payment for the use of *rented track*, is an operating expense, the same as payment for the use of rented cars, and payment for fuel, supplies and services of operatives.

3. That operating expenses incurred in keeping a railroad a "going concern," or in any other way tending to preserve the value of the mortgaged estate, are enti-

tled to payment out of proceeds of sale in preference to mortgage bonds, even although the gross earnings were insufficient to pay all the operating expenses.

By the testimony of A. P. Hewitt, Auditor of the C., C., C. & I. Ry. Co., also Acting Auditor of the Indianapolis and St. Louis Railroad Company under the Receiver, it is proven that the gross earnings received by the Indianapolis and St. Louis Railroad Company during the fifteen years, on its own and its leased line, were more than sufficient to have paid in full all operating expenses, *including the rent of the leased line*, notwithstanding the fact that very large sums of money were charged to operating expense account, which were, in fact, used in rebuilding the Indianapolis and St. Louis Railroad from Terre Haute to Indianapolis, preparatory to a foreclosure sale in the interest of the C., C., C. & I. Ry. Co., as principal holder of the second and third mortgage bonds. (Record pp. 80, 82.)

Exhibit "S" (Record, p. 78), which is part of the testimony of this same witness, shows gross earnings during the fifteen years,—lacking eight days,—$26,868,252.31; amount charged to operating expense account, $19,417,078.26; amount charged as rent already paid to the St. L., A. & T. H. R. R. Co. for the use of the leased line, and which should have been included in the column of operating expenses, $6,464,869.19. These last two items added together make $25,881,947.45. Now, if we add to this last sum $664,874.70, amount of rent found due by the decree of July 26, 1882, (Appendix, p. 4,) this makes the total sum of operating expenses, *including all rent to the St. L., A. & T. H. R. R. Co., both paid and un-*

paid, $26,546,822.15, which, subtracted from the total of gross earnings, leaves a surplus of $321,430.16, which is proper net earnings, and would be vastly larger except for improper charges to operating expense account.

This same result is shown by this same Exhibit "S" upon another computation. The column of this Exhibit, headed "Net Earnings," is a fiction. It has just been shown, by abundant authority, that there are no net earnings until all operating expenses are paid, and that rent of track is an operating expense.

This column of so-called "net earnings" is the amount of gross earnings left after paying all of the operating expenses, *excepting the rent of the leased line.* The footing of this column, called "net earnings," is, therefore, the amount of gross earnings received by the Indianapolis and St. Louis Railroad Company, out of which all rent to the St. L., A. & T. H. R. R. Co. for the use of the leased line should have been first paid. The footing of this column is $7,451,174.05. The next column of the Exhibit shows that the rent already paid to the St. L., A. & T. H. R. R. Co. is $6,464,869.19. The rent due and unpaid, as shown by the decree of July 26, 1882, is $664,874.70. Adding this paid and unpaid rent together makes the total amount that should have been paid out of the gross earnings of the entire line from Indianapolis to St. Louis, $7,129,743,89, which amount, subtracted from the $7,451,174.05 of miscalled net earnings, leaves a surplus of $321,430.16, which is actual net earnings. As before stated, this amount of actual net earnings would be vastly larger if the rebuilding of the railroad of the Indianapolis and St. Louis Railroad in

1880, 1881 and the first five months of 1882 had not been charged to operating expense account.

In making these computations the amount due on unpaid rent for the leased line has been computed as $664,874.70, which is the amount decreed due by the decree of July 26, 1882. But this amount includes interest on unpaid rent up to July 1, 1882. The principal of the rent then due was only $541,358.23, the accrued interest being $123,516.47. (Appendix, pp. 3, 4.) Hence if rent for the use of the rented track and equipment had been paid out of the gross earnings when it fell due and should have been paid, the actual net earnings of the entire line, after paying all operating expenses, *including rent of the leased line*, would have been $449,946.63, instead of $321,430.16, as above shown.

These computations conclusively negative, and put forever at rest, the claim that the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. were obliged to advance, and did advance, large sums of money under their guaranty contract, for the payment of rent for the use of the leased line and equipment. There was never any necessity for the advance of a penny for any such purpose, if gross earnings had been properly applied to the payment of operating expenses.

The above computations show conclusively that if the gross earnings had been properly applied to the payment of operating expenses, instead of being diverted to payment of Indianapolis and St. Louis Railroad Company bond interest, and for improvements and new construction to the mortgaged property, all operating expenses, including all rent for the leased line and its

equipment, would have been fully paid, and net earnings to the amount of $400,000 would have remained for application to bond interest. These bondholders have received in interest on their bonds, and in values added to the mortgaged property, nearly or quite three times as much as the entire amount advanced by them during the fifteen years. In another connection the exact figures will be given touching this last statement.

This Exhibit "S" further shows that in each of the years, considered separately, the gross earnings of the entire line, from Indianapolis to St. Louis, were sufficient to pay all operating expenses, *including rent for the use of the leased line*, and leave net earnings besides, excepting only three or four years. The average gross earnings for the whole period were, as has been seen, more than sufficient to pay all operating expenses, including rent for the leased line. The only years in which any substantial deficiency arose were 1878, 1881, and the first five months of 1882. It will be remembered that 1878 is the year the Indianapolis and St. Louis Railroad Company ceased paying rent and this litigation was commenced. The troubles arising from a refusal to pay rent, and the consequent litigation, very naturally tended to reduce the gross earnings of that year a good deal below the general average. The transactions of the year 1878 will be carefully considered in another connection.

During the seventeen months from January 1, 1881, to May 23, 1882, the gross earnings were fully up to and above the average, and would have been abundantly sufficient to pay all operating expenses, including pay-

ment of rent for the rented line and equipment, except for the fact that unusual and exorbitant amounts were charged to operating expense account. During this seventeen months far more than the entire gross earnings were charged to operating expenses, *without including any rent for the leased line.* The gross earnings for the seventeen months were $2,598,020.76. Amount charged to operating expenses, without including rent for the leased line, during the same period, is $2,816,-642.08. (Record, p. 78.)

This shows the amount charged to operating expenses to be nearly double the amount charged for any other seventeen months of the fifteen years, and is $218,-621.32 more than the entire gross earnings for the seventeen months. These exorbitant charges to operating expenses are explained by the witness Hewitt, who testifies that "LARGE IMPROVEMENTS WERE BEING MADE TO THE PROPERTY." (Record p. 82.)

It is not very probable that the Indianapolis and St: Louis Railroad Company was very diligent in making "large improvements" to the leased line during this period. It had refused to pay rent, and had been in litigation with its lessor since October 26, 1878. From that date down to May 23, 1882, the St. L., A. & T. H. R. R. Co. had only been preserved from absolute bankruptcy and ruin by the interlocutory order of the Court compelling the Indianapolis and St. Louis Railroad Company to pay over to the St. L., A. & T. H. R. R. Co. 30 per cent. of the gross earnings *earned on the track of the leased line.* The only theory upon which it can be imagined that under these circumstances the Indian-

apolis and St. Louis Railroad Company would make "large improvements" on the leased line is that the C., C., C. & I. Ry. Co., as owner of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company, and as prospective purchaser of the road of that company at foreclosure sale, was then looking forward to the NEW LEASE of the railroad, equipment and franchises of the St. L., A. & T. H. R. R. Co. and desired to have the leased line put in repair preparatory to taking possession of it under the new lease. If this theory were true, it would only intensify the wrongfulness of the diversion of earnings which should have been applied to payment of ordinary operating expenses, including rent for the use of the leased line. But an examination of the record proves that the "large improvements" were made, not upon the leased line, but upon the line from Indianapolis to Terre Haute preparatory to taking it in at foreclosure sale.

In the seventeen months from January 1, 1881, to May 28, 1882, there were charged as operating expenses of the seventy-one miles from Indianapolis to Terre Haute,—without including any rent for the leased line, $822,581.00. (Record p. 50, Exhibit "A"). This is a charge of operating expenses at the rate of $8,177.52 per mile per year.

During the same period the charge to operating expenses on the one hundred and ninety-three miles of the leased line,—without including any rent for the use of it,—is $1,994,111.08. (Record p. 76, Exhibit "Q", and p. 65, Exhibit "K"), which is a charge of operating expenses at the rate of only $7,293.24 per mile per year,

showing a discrimination in favor of the line from Indianapolis to Terre Haute and against the leased line at the rate of $884.28 per mile per year. This proves where the "large improvements" testified to by Mr. Hewitt were placed.

Taking the period from January 1, 1878, to May 23, 1882,—which covers the period during which the Indianapolis and St. Louis Railroad Company paid no rent for the use of the leased line, excepting only 30 per cent. of the gross earnings on the track of the leased line from December, 1878, to May 23, 1882,—this discrimination against the line in the matter of repairs and improvements charged to operating expenses will be found to be equally marked, although not quite as great as it was during the last seventeen months as above shown.

From January 1, 1878, to May 23, 1882,—fifty-three months,—there were charged as operating expenses of the seventy-one miles from Indianapolis to Terre Haute, —without including any rent for the leased line,—$1,-833,690.42. (Record p. 50, Exhibit "A".) This is a charge of operating expenses at the rate of $5,847.48 per mile per year for the fifty-three months. Dnring the same period the charge to operating expenses on the one hundred and ninety-three miles of the leased line,—without including any rent for the use of it,—is $4,420,-129.10. Record p. 76, Exhibit "Q", p. 65, Exhibit "K"), which is a charge of operating expenses at the rate of only $5,185.32 per mile per year for the fifty-three months, showing a discrimination in favor of the line from Indianapolis to Terre Haute and against the leased

line at the rate of $662.16 per mile per year during the four years and five months. This account shows beyond cavil where the "large improvements" were placed.

Exhibit "A" (Record, p. 50,) has a column headed "Net Earnings," and purports that during twelve years the line from Indianapolis to Terre Haute made $2,160,-391.03 net earnings. This is a fiction. In this, as in all the other Exhibits above referred to, *payment for the use of the leased line and its equipment is left out of the account as an operating expense.* This $2,160,391.03 of so-called net earnings added to the $5,290,783.02 of so-called net earnings shown in Exhibit "K" (Record, p. 65), make up the $7,451,174.05 erroneously called net earnings in Exhibit "S." (Record, p. 78.) As before stated, this is simply gross earnings left after paying all of the operating expenses, *excepting rent for the leased line and its equipment.* Out of this $7,451,174.05 all the rent now due to the St. L., A. & T. H. R. R. Co. should have been paid AS AN OPERATING EXPENSE OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY. If it had been so paid there still would have remained a large sum of the earnings which could properly be called net earnings.

If evidence can establish any fact the evidence in this record establishes the fact that the gross earnings of the line from Indiadapolis to St. Louis were amply sufficient to have paid all operating and repair expenses, *including all rent for the use of the leased line and its equipment,* notwithstanding the fact that large sums of gross earnings were applied to improvements instead of ordinary operating expenses. The evidence further estab-

lishes the fact that instead of applying these gross earnings to the payment of rent for the leased line they have been wrongfully applied to payment of bond interest and to payment for new construction and improvements to the railroad of the Indianapolis and St. Louis Railroad Company. (Record, pp. 52, 53.)

The law, as established by decisions of this Court already cited, is that payment for rented track and equipment is an operating expense; that there are no net earnings until all operating expenses are fully paid, and that if gross earnings are diverted to payment of bond interest, or to adding value to the mortgaged estate by way of additions and improvements, the proceeds of sale are justly and equitably applicable to the payment of the operating expenses that should have been paid with the diverted gross earnings. Upon these grounds the St. L., A. & T. H. R. R. Co. here asks payment of the amount justly due it for the use of its railroad, equipment and franchises by the Indianapolis and St. Louis Railroad Company out of the proceeds of sale in preference to any payment upon the mortgage bonds upon which the foreclosure sale was made.

Second. THE AMOUNT DUE TO THE ST. L., A. & T. H. R. R. CO. FOR THE USE OF ITS RAILROAD, EQUIPMENT AND FRANCHISES BY THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY SHOULD BE PAID OUT OF THE PROCEEDS OF SALE IN PREFERENCE TO THE MORTGAGE BONDS, BECAUSE IT IS A DEBT DUE TO A CONNECTING LINE.

All that has been said regarding payment, out of the proceeds of sale, of the amount justly due for the use of the leased line and equipment as an operating ex-

pense of the Indianapolis and St. Louis Railroad Company, and that the St. L., A. & T. H. R. R. Co. is entitled to preference in payment over the owner of the mortgage bonds, applies in support of this proposition.

Dues to connecting lines have very generally, it might perhaps be said universally, been regarded as preferred claims and their payment decreed in preference to mortgage bonds. This has frequently been done even in cases where the gross earnings were insufficient to pay all of the operating expenses, and where no diversion of gross earnings to payment of bond interest or for improvements to the mortgaged property is shown. This is because Courts of Equity have universally held that it is a great benefit and pecuniary advantage to bondholders, and largely tends to preserve the income producing value of the mortgaged property to keep it a "going concern," thereby preserving its business. To preserve the business of a railroad, its business connections with other lines and with distributing railroad centers, must be preserved. Of course all dues to connecting lines are operating expenses just as all dues from connecting lines are earnings. It follows that if gross earnings are sufficient to pay all operating expenses, dues to connecting lines are unquestionably entitled to full payment out of gross earnings before any earnings are to be regarded as net earnings. If gross earnings out of which dues to connecting lines might have been paid are applied in payment of bond interest, or for additions to the value of the mortgaged property by way of new construction and improvements, proceeds of sale should be applied to the payment of such unpaid debts

due to connecting lines, in preference to the mortgage bonds.

These statements are in exact accord with the law as established by the decisions of this Court.

Miltenberger v. *Logansport Ry. Co.*, 106 U. S. 311, 312.

Union Trust Co. v. *Souther*, 107 U. S. 594, 595.

Burnham v. *Bowen*, 111 U. S. 780, 781.

Union Trust Co. v. *Illinois Midland Co.*, 117 U. S. 457, 458.

It is perfectly evident that every condition mentioned in these decisions, or in either of them, exists in this case. The connecting line furnished by the St. L., A. & T. H. R. R. Co. was an indispensable necessity to the Indianapolis and St. Louis Railroad Company. Without it the Indianapolis and St. Louis Railroad Company could not have earned its operating expenses a single month. This is proved by the analysis of the earnings of the Indianapolis and St. Louis Railroad Company on its own track. (Record pp. 85 to 88.) Without this connecting line the Indianapolis and St. Louis Railroad Company would have had no through freight or passenger traffic, and no through mail and express business. The record shows that nearly three-fourths of all the earnings ever received by the Indianapolis and St. Louis Railroad Company came into its treasury directly from this connecting line, while almost two-thirds of the earnings made on the railroad belonging to the Indianapolis and St. Louis Railroad Company were derived from business received by it from, and by means of, this connecting line. The record further

shows that the gross earnings of the Indianapolis and St. Louis Railroad Company received from its connecting line, and from its own line, were more than sufficient to pay all operating expenses, *including the debt due to the St. L., A. & T. H. R. R. Co.*, regarded as a connecting line. The fact that this debt to the St. L., A. & T. H. R. R. Co. remains unpaid, while over two million dollars have been paid by the Indianapolis and St. Louis Railroad Company in interest on its mortgage bonds, (Record p. 52,) is sufficient proof that gross earnings which ought to have been applied to payment of this debt due to the connecting line have been wrongfully applied to the payment of interest.

In the order appointing the Receiver of the Indianapolis and St. Louis Railroad Company, entered at the request of the Trustee representing the C., C., C. & I. Ry. Co., as bondholder, the Court made a specific condition reserving the right to order payment of all such debts as this. The reservation is as follows:

"This Court expressly reserves to itself the right and power to make such orders and decrees touching the payments of the debts of the said Indianapolis and St. Louis Railroad Company, incurred in the management and operation of said railroad prior to the appointment of said Receiver, as may be equitable and just." (Appendix p. 11.)

It will be observed that this reservation *is without limitation as to the time the indebtedness accrued.*

The foreclosure decree also contained a like reservation touching payment of such debts out of proceeds of sale in the following words:

"The Court reserves to itself the right, by subsequent order or orders, to distribute the proceeds of the sale of said railroad and property connected therewith, and to make such further order and decree in regard to the distribution of the proceeds of sale as may to the Court seem just and equitable." (Appendix, p. 23.)

If, therefore, the debt due to the St. L., A. & T. H. R. R. Co. for the use of its railroad, equipment and franchises is held to be a debt due to it as a connecting line, the facts disclosed by the record, and the law, as announced by repeated decisions of this Conrt, require its payment out of proceeds of sale in preference to the mortgage bonds.

Third. THE AMOUNT EQUITABLY DUE TO THE ST. L., A. & T. H. R. R. CO. FOR THE USE OF ITS RAILROAD, EQUIPMENT AND FRANCHISES BY THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY OUGHT TO BE PAID OUT OF THE PROCEEDS OF SALE IN PREFERENCE TO PAYMENT OF THE MORTGAGE BONDS, BECAUSE GROSS EARNINGS, OUT OF WHICH THIS DEBT OUGHT TO HAVE BEEN PAID, HAVE BEEN DIVERTED TO PAYMENT OF BOND INTEREST, AND TO PAYMENT FOR NEW CONSTRUCTION AND IMPROVEMENTS TO THE RAILROAD OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY.

The law in support of this proposition is well settled. In the leading case of *Fosdick* v. *Schall*, 99 U. S., 253, 253, 254, Mr. Chief Justice White said:

"When companies become pecuniarily embarrassed it frequently happens that debts for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a

disasterous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. * * * If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the Court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the Court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the Court will only do what, if a receiver should not be appointed, the company ought itself to do. * * * We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the Court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property, or the income, but because, in a sense, the officers of the company are trustees of the

earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the Court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way."

In *Miltenberger* v. *Logansport Ry. Co.*, 106 U. S. 311, Mr. Justice Blatchford, in delivering the opinion of the Court, said:

"Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the Receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, *or even the corpus of the property*, under the order of the Court, with a priority of lien."

The ruling in this case was expressly approved and affirmed in the case of *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 457.

That equity may require such claims to be paid in preference to mortgage bonds, even where there has been no diversion of earnings to the benefit of the mortgagees, is clearly shown by the decision of this Court in the case of *Burnham* v. *Bowen*,, 111 U. S. 781, 782. In delivering the opinion Mr. Chief Justice Waite said:

"It is said, however, that as no part of the income, before the appointment of the Receiver, was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the fund belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the Receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the Receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt of Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the Court after the Receiver was appointed as that before. * * * But it is further

insisted that, * * * there is no power now to order a sale of the property, in the hands of the trustees, to pay back what has thus been diverted. In *Fosdick* v. *Schall*, p. 254, it was said that if in a decree of foreclosure a sale is ordered to pay the mortgage debt, provision may be made for a restoration from the proceeds of the sale of the fund which has been diverted, and this clearly because, in equity, the diversion created a charge on the property for whose benefit it had been made."

Exhibit "S", (Record p. 76,) shows an apparent deficit for the entire fifteen years of $1,248,091.76. This means that the Indianapolis and St. Louis Railroad Company has paid for the various items of expense mentioned in the Exhibit $1,248,091.76 more than the entire gross earnings received by it from its own and its leased line. But this same Exhibit shows that during this fifteen years the bondholders of the Indianapolis and St. Louis Railroad Company have been paid in interest on their bonds $2,234,396.62, *which is $986,304.86 more than the entire apparent deficit.* This proves that not only has the entire deficit, as shown by this exhibit, arisen from payment of bond interest, but that the bondholders have received in interest alone $986,304.86 more than the entire sum called a deficit in the Exhibit. If this does not prove diversion of gross earnings to payment of bond interest what evidence could prove diversion? This $986,304.86 of gross earnings diverted to payment of bond interest is more than enough to pay the debt now due for the use of the leased line.

Permit me to put this same illustration in another form. Exhibit "S" shows a deficit of $1,248,091.76.

Now if we add to this apparent deficit the original principal of the debt still due to the St. L., A. & T. H. R. R. Co. for the use of the leased line and equipment, which is $541,358.23, (Appendix p. 3) the apparent deficit for the entire fifteen years would have been $1,789,449.99 IF ALL RENT FOR THE USE OF THE LEASED LINE AND EQUIPMENT HAD BEEN PAID WHEN IT FELL DUE. But this same Exhibit shows that the bondholders of the Indianapolis and St. Louis Railroad Company have been paid interest on their bonds to the amount of $2,234,396.62, which is $444,946.63 more than the entire deficit would have been *if all rent for the leased line and equipment had been paid out of gross earnings.* If this does not prove that the gross earnings,—out of which the debt now due the St. L. A. & T. H. R. R. Co. for the use of its railroad and equipment ought to have been paid,—have been diverted to payment of bond interest, what proof could establish that fact?

These figures show that the gross earnings were sufficient to pay all operating expenses, *including all rent for the leased line*, and leave a surplus of $444,946.63 properly applicable to bond interest. But instead of so applying the gross earnings $2,234,396.62 were applied to bond interest, instead of $444,946.63, thus leaving a deficit, as shown by Exhibit "S," besides leaving rent for the leased line unpaid.

It will be claimed that large advances were made by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. under their guaranty contract, and that such advances were necessary in order to enable the Indianapolis and St. Louis Railroad Company to pay the rent that has already

been paid for the use of the leased line. This claim was zealously urged on the former appeal, and seems to have produced a strong impression upon a majority of this Court. In the opinion deciding the former appeal Mr. Justice Miller said:

"Whatever may be said in regard to the Indianapolis and St. Louis Company, there is wanting in the case of the guaranteeing companies one of the strongest reasons usually urged in support of the estoppel, as it is sometimes called, namely, that the recalcitant party has received the money or the property of the other. For, so far from these guaranteeing companies having received of the plaintiffs any money or property, they are the parties who have been paying money and the plaintiffs receiving it for rent of its road. They are not, therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have heretofore done so. On the contrary, as we have already said, the duties of these directors to their stockholders is to cease to perform a contract to which they were never bound."

Penn. Co. v. *St. Louis, Alton, Etc., Railroad*, 118 U. S. 317,318.

The facts and figures above given prove conclusively that if the gross earnings had been properly applied as required by law and equity there never would have been any necessity for the advance of a penny to the Indianapolis and St. Louis Railroad Company to enable it to pay all of its operating expenses, *including all rent for the use of the rented railroad and equipment*, notwithstanding the fact that enormous and improper charges, as has

already been shown, were made to operating expense account.

It must be remembered that the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. were not only the owners of substantially all of the capital stock of the Indianapolis and St. Louis Railroad Company, but were also large holders of the mortgage bonds of the Indianapolis and St. Louis Railroad Company. Originally they held substantially all of the mortgage bonds ever issued by the Indianapolis and St. Louis Railroad Company. At some time,—the record does not disclose when,—they disposed of part of the first mortgage bonds to other parties, but continued to hold substantially all of the second and third mortgage bonds. The C., C., C. & I. Ry. Co. alone now holds substantially all of these second and third mortgage bonds. (Record, pp. 73, 51.) It therefore appears plain that in addition to the benefit derived from controlling a through line connecting Indianapolis with St. Louis the C., C., C. & I. Ry. Co.,—and the Penn. R. R. Co. until it sold out its interest to the C., C., C. & I. Ry. Co.,—had a large pecuniary interest in keeping the Indianapolis and St. Louis Railroad Company a "going concern," and in preventing it from defaulting in payment of interest until such time as the C., C., C. & I. Ry. Co., as the owner of its capital stock and its second and third mortgage bonds, might be ready to take its railroad and property on foreclosure sale. This double pecuniary interest accounts for all the advances ever made, *not one dollar of which would ever have been needed to pay rent for the use of the leased line, or for payment of any other operating expense, if the gross earnings had been properly applied.*

The total advances to the Indianapolis and St. Louis Railroad Company by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. amount to $1,582,170.24. (Record, p. 46.) This constitutes one side of the account. For the other side of the account the record furnishes proof of the following items: Amount paid out by the Indianapolis and St. Louis Railroad Company on bond interest, $2,234,396.62. (Record, pp. 52, 78.) Amount paid into mortgage bond sinking fund by the Indianapolis and St. Louis Railroad Company, $47,809.74. (Record, p. 53, Exhibit "F.") Amount paid on bond interest by Devereux as Receiver, $11,585. (Record, p. 54, Exhibit "G.") It will be remembered that the Indianapolis and St. Louis Railroad Company was completed and opened for business on July 10, 1870. The original construction account closed July 1, 1870, and the road was regarded as completed on that day,—which was the day the new Vandalia line was opened for business,—but the Indianapolis and St. Louis Railroad did not open its new line for business until July 10, 1870. The record shows that from July 1, 1870, to May 23, 1882, the Indianapolis and St. Louis Railroad Company paid out for new construction, additions, new equipment and improvements for its line from Indianapolis to Terre Haute, $1,716,988.69. (Record, p. 53, Exhibit "E.") This amount is obtained by subtracting the first item of said Exhibit from the final footing of the Exhibit. But Mr. Hewitt, in his testimony, says that the last item of Exhibit "E,"—$233,576.92,—was really expended in the original construction of the road prior to August 31, 1870, but was not charged up to construction account until 1882.

(Record, p. 89.) This seems strange, and it seems still more strange that the witness should testify that this amount was paid out "*prior to August 31, 1870.*" If it was paid out between July 10th and August 31, 1870, it was for additions and improvements to the mortgaged property after its original construction, because the road was constructed, completed and opened for business on July 10, 1870.

But in order that the account we are constructing may be abundantly fair and beyond question, we will subtract this $283,576.92,—the last item of Exhibit "E", —from the $1,716,988.69, above found as the amount expended for new construction, additions, new equipment and improvements. This leaves the unquestioned amount paid by the Indianapolis and St. Louis Railroad Company, after the completion of its road, for additions, new construction, new equipment and improvements to the mortgaged property $1,433,411.77.

These items above given constitute an account showing exactly the amount these bondholders, or guarantors, have contributed to the Indianapolis and St. Louis Railroad Company, and exactly the amount the Indianapolis and St. Louis Railroad Company has paid out in bond interest and for additions, improvements and added values to the mortgaged estate. The account stands thus:

Amount paid by the company on bond interest	$2,234,896.62
Amount paid by the company to mortgage bond sinking fund	47,809.74
Amount paid by Receiver on bond interest	11,585.00
Amount paid by company for new construction, additions, new equipment and improvements to the mortgaged property	1,483,411.77
Total amount paid for benefit of the bondholders	$3,777,203.13
Total amount advanced by C., C., C. & I. Ry. Co. and Penn. R. R. Co.	1,582,170.24
Net cash benefit received by the bondholders over and above all advances made by them	$2,195,032.89

If these facts do not prove conclusively that the advances were made to enable the Indianapolis and St. Louis Railroad Company to pay its bond interest and to pay for additions and improvements to the mortgaged property, and not for the payment of rent for the use of the leased line, or for any other operating expense, it is impossible to prove any fact. These bondholders and stockholders of the Indianapolis and St. Louis Railroad Company, who claim to have made such large advances for the benefit of the St. L., A. & T. H. R. R. Co., are here proved by this record to have received in improvements and added values to their mortgaged property alone, a sum almost equal to the entire amount of their advances, while, in addition, $2,293,791.86 has been paid out for their benefit in bond interest and for mortgage bond sinking fund.

We have already seen from this record that the gross earnings of the entire line from Indianapolis to St. Louis were sufficient to have paid all operating expenses, including all rent for the use of the leased line that has been paid, and all that should have been paid, but is now unpaid, and that a surplus of earnings of $444,946.63 would have remained for application on bond interest, but these figures above given prove that the bondholders have received the benefit of $2,195,-032.89 over and above all of their advances. Whereas the utmost they should have received from gross earnings is $444,946.63. This immense sum of $2,195,032.89 was paid out of gross earnings, and rent for the use of rented track and equipment, by the use of which these gross earnings were made, is left unpaid. If this is not diversion of earnings, falling exactly under the definition laid down in *Fosdick* v. *Schall*, *supra*, what state of facts could constitute a diversion?

But it may be claimed that the debt now due the St. L., A. & T. H. R. R. Co. accrued subsequent to January 1, 1878, and that therefore it will not do to make computations upon the transactions of the entire fifteen years.

The decision of this Court in *Burnham* v. *Bowen*, *supra*, settles the law definitely against any such claim or proposition, but the record will show a large diversion of gross earnings to the benefit of the bondholders during the period beginning with January 1, 1878. The Penn. R. R. Co. made no advances after June 1, 1878. The C., C., C. & I. Ry. Co. made no advances from June 1, 1878, until July 1, 1881. The Receivership began

May 24, 1882, and ended October 1, 1882. The total advances made by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., from January 1, 1878, to October 1, 1882, amount to $510,306.24. (Record pp. 48, 49, and 46.) Constructing the account for this shorter period on the same basis as above, the account would stand thus:

Interest on mortgage bonds paid by the company after January 1, 1878, (Record p. 52, Exhibit "D.")	$490,105.00
Amount paid by the company to mortgage bond sinking fund after January 1, 1878, (Record p. 53, Exhibit "F.")	5,810.00
Bond interest paid by Receiver, (Record p. 54, Exhibit "G.")	11,585.00
Amount paid by the company for additions and improvements to the mortgaged property during the years 1878, 1879, 1880 and 1881, (Record p. 53, Exhibit "E.")	256,501.05
Making total amount paid for benefit of the bondholders	$764,000.96
Total advances by C., C., C. & I. Ry. Co. and Penn. R. R. Co. during same period as above	510,306.24
Net cash benefit received by the bondholders after January 1, 1878, over and above all advances made by them	$253,694.72

It will be observed that in both of these computations the entire amount of advances by the guarantor companies for the respective periods embraced in the

computations have been deducted from and applied upon amounts paid out by the Indianapolis and St. Louis Railroad Company to its bondholders in interest and for the benefit of its bondholders in additions and improvements to the mortgaged property, and that in both instances the bondholders have received large amounts out of the gross earnings that ought to have been applied to the payment of the debt due the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment, *over and above all advances made by the guarantor companies* owning the stock of the Indianapolis and St. Louis Railroad Company, and large holders of its mortgage bonds. If this is not diversion of gross earnings, it would be quite difficult to describe any state of facts that would constitute diversion.

It certainly cannot be claimed that the advances made after January 1, 1878, were necessary to enable the Indianapolis and St. Louis Railroad Company to pay for the use of the rented track and equipment, because from April 1, 1878, down to the close of the Receivership, October 1, 1882, the Indianapolis and St. Louis Railroad Company *paid no rent under the lease.* All the compensation received by the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment from April 1, 1878, to October 1, 1882, was 30 per cent. of the gross earnings *earned on the rented track from October 26, 1878, to October 1, 1882.* NOT A DOLLAR HAS EVER BEEN PAID FOR THE USE OF THE LEASED LINE FOR THE SEVEN MONTHS FROM APRIL 1, TO NOVEMBER 1, 1878. It is therefore, perfectly plain that the payment of the $253,-694.72 paid on interest and for improvements after Jan-

uary 1, 1878, in excess of all advances made by the guarantors during that period, was a palpable diversion of gross earnings.

This diversion becomes the more glaring in view of the fact that during the last seventeen months prior to the Receivership, viz: January 1, 1881, to May 23, 1882, *more than all of the gross earnings of the entire line were charged up to the operating expense account, without counting anything for rent of the leased line as an operating expense.* A glance at Exhibit "S" (Record, p. 78,) will show that the charges to operating expense account for this seventeen months,—without including any rent for the leased line,—are nearly double the average operating expenses of other years, and that in the last five months the entire gross earnings only paid about two-thirds of the amount charged to operating expense account, although the gross earnings were for that five months nearly or quite up to the general average. Can any one believe that these enormous charges to operating expense account cover only ordinary repairs and operating expenses? That large diversion of gross earnings to improvements and added values is covered by these charges to operating expense account is too plain for controversey. The witness Hewitt swears that "*large improvements were being made to the property during these months.*" (Record, p. 82.) It is also easy to locate these "LARGE IMPROVEMENTS." They consist in practically rebuilding the railroad of the Indianapolis and St. Louis Railroad Company preparatory to foreclosure sale. Exhibit "A" (Record, p. 50) shows that during the year 1881, $559,007.10 were charged to oper-

ating expense account of a railroad seventy-one miles in length. This is at the rate of $7,873 per mile per year for operating expenses of a railroad only ten years old. Everybody knows that that charge covers "*large improvements.*" Again, this same Exhibit (Record, p. 50) shows that in four months and twenty-three days of 1882 $263,523.90 were expended on the seventy-one miles from Indianapolis to Terre Haute and charged to operating expense account. This is at the rate of $8,907.85 per mile per year. That this charge covers "*large improvements*" to the mortgaged estate is beyond question.

These "large improvement" charges to operating expense account are all in addition to the large amounts paid out for new construction, additions, new equipment and improvements to the railroad from Indianapolis to Terre Haute, as shown by Exhibit "E." (Record, p. 53.) Many other illustrations of diversion of gross earnings to the benefit of the Indianapolis and St. Louis Railroad Company bondholders might be drawn from the testimony in the record, but enough has been shown to prove clearly that enough gross earnings have been diverted to the direct benefit of the bondholders to pay the debt now due to the St. L., A. & T. H. R. R. Co. two or three times.

If the law, now firmly established by the decisions of this Court, is to remain the law, these diverted gross earnings must be restored out of the proceeds of sale, so far as may be necessary, to fully pay the debts that ought to have been paid out of the gross earnings so diverted. The St. L., A. & T. H. R. R. Co. asks pay-

ment out of proceeds of sale of the debt decreed due it by the decree of July 26, 1882, for the use of its railroad and equipment by the Indianapolis and St. Louis Railroad Company:

1. Because this debt is an operating expense of the Indianapolis and St. Louis Railroad Company, payable out of the gross earnings of the entire line, from Indianapolis to St. Louis,—the said gross earnings being sufficient to pay all operating expenses, including this debt, as an operating expense.

2. Because this debt is a debt due to a connecting line, and, in common with all other dues to connecting lines, is an operating expense of the Indianapolis and St. Louis Railroad Company.

3. Because gross earnings received by the Indianapolis and St. Louis Railroad Company have been by it diverted to the benefit of its bondholders to such amounts as would have been far more than sufficient to have paid this debt.

IV.

The C., C., C. & I. Ry. Co., in claiming the application of all the remaining proceeds of sale to the payment of the second and third mortgage bonds in preference to the payment of the debt due to the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment, does not stand before a Court of Equity in the position of an ordinary bondholder. The peculiar relations existing between the C., C., C. & I. Ry. Co. and the Indianapolis and St. Louis Railroad Company greatly strengthen the equity in favor of the St. L., A. & T. H. R. R. Co. in its claim for preference in payment over the second and third mortgage bonds.

In weighing the equities existing between the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co. as rival claimants for preference in payment of their respective claims out of the proceeds of the sale of the railroad and property of the Indianapolis and St. Louis Railroad Company, it is impossible for a Court of Equity to ignore, or fail to consider, the peculiar relations existing between the C., C., C. & I. Ry. Co. on the one hand, and both the Indianapolis and St. Louis Railroad Company and the St. L., A. & T. H. R. R. Co. on the other hand.

Notwithstanding the fact that the lease of September 11, 1867, has been held void, and notwithstanding the fact that the guaranty contract of the same date fell with the lease, and has ceased to be a legal obligation, because the contract it guaranteed has been held void, nevertheless, the equities and moral obligations growing out of the relations assumed, and positions occupied, by reason of those contracts, still remain. To hold otherwise would be to encourage fraud, chicanery and bad faith.

This Court has spoken with no uncertain voice upon this point. In *Thomas* v. *Railroad Co.*, 101 U. S. 86, Mr. Justice Miller said:

"There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the Courts have refused to sustain an action for the recovery of the property or the money so transferred. * * * The executed dealings

of corporations must be allowed to stand for and against both parties *when the plainest rules of good faith require it.*"

The claim of the St. L., A. & T. H. R. R. Co. here presented is for "executed dealings," past transactions in which the St. L., A. & T. H. R. R. Co. has fully performed its part of the contract, and in which the Indianapolis and St. Louis Railroad Company has performed that part of the contract that gave it the benefit of the possession and use of the leased line, but has failed to perform that part of the contract requiring payment for the use of the leased line. Releasing the C., C., C. & I. Ry. Co. from its legal liability as guarantor has by no means blotted out the history of the ACTS of that company as bondholder and stockholder of the Indianapolis and St. Louis Railroad Company; nor has that release from liability as guarantor obliterated or overcome the equities that have grown up under and by reason of *its action* in the premises.

It is a fact that the C., C., C. & I. Ry. Co. was a *chief actor* in inducing the St. L., A. & T. H. R. R. Co. to execute the original lease of May 17, 1867.

It is a fact that the C., C., C. & I. Ry. Co. was a *chief actor* in creating the Indianapolis and St. Louis Railroad Company.

It is a fact that the Indianapolis and St. Louis Railroad Company was created for the express purpose of its becoming lessee in lieu of the Terre Haute and Indianapolis Railroad Company in the lease of May 17, 1867.

It is a fact that the C., C., C. & I. Ry. Co. requested

the St. L., A. & T. H. R. R. Co. to accept the Indianapolis and Terre Haute Railroad Company as lessee in lieu of the Terre Haute and Indianapolis Railroad Company, and, in order to procure such acceptance, did sign and deliver a written contract, by which it covenanted and guaranteed that the Indianapolis and St. Louis Railroad Company should at all times keep and perform all the conditions and obligations of the substituted lease of September 11, 1867.

It is a fact that the St. L., A. & T. H. R. R. Co. accepted the Indianapolis and St. Louis Railroad Company as lessee, and executed the substituted lease of September 11, 1867, in good faith, relying upon the guaranty contract of September 11, 1867.

It is a fact that the St. L., A. & T. H. R. R. Co. had, by the laws of the State giving it corporate existence, full power and authority upon its part to execute the lease of September 11, 1867.

It is a fact that the C., C., C. & I. Ry. Co. and the P., Ft. W. & C. Ry. Co.,—or its lessee, the Penn. R. R. Co.,—did from the time of its creation until after this litigation commenced, own, in nearly equal proportions, substantially all of the capital stock of the Indianapolis and St. Louis Railroad Company, and by reason of such ownership did control the Indianapolis and St. Louis Railroad Company and shape its policy by electing as officers, directors and managers of the Indianapolis and St. Louis Railroad Company their own officers, directors, managers or employees interested in their own lines of road, and that subsequent to the commencement of this litigation the Penn. R. R. Co., as lessee of the P., Ft. W.

& C. Ry., did dispose of the capital stock and mortgage bonds of the Indianapolis and St. Louis Railroad Company then held by it to the C., C., C. & I. Ry. Co.

It is a fact that the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. originally took, in equal proportions, substantially all of the three series of mortgage bonds issued by the Indianapolis and St. Louis Railroad Company at a heavy discount, the total face of said three series of bonds being $3,500,000, and the total discount being $512,000.

It is a fact that the C., C., C. & I. Ry. Co. now owns substantially all of the second and third mortgage bonds of the Indianapolis and St. Louis Railroad Company upon which the foreclosure sale took place.

It is a fact that the gross earnings of the entire line from Indianapolis to St. Louis from September 11, 1867, to October 1, 1882, were more than sufficient to pay all repair, maintenance and operating expenses, including all rent of the leased line according to the terms of the lease, leaving surplus or net earnings of about $400,000.

It is a fact that the bondholders,—the C., C., C. & I. Ry. Co. being a chief bondholder,—have received in interest on mortgage bonds and in additions, new equipment and improvements to the mortgaged property, $3,777,208.13.

It is a fact that the total advances made by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. aggregate $1,582,170.24.

It is a fact that the bondholders have received in interest on bonds and added values to the mortgaged estate $2,195,032.89 more than the entire advances made

by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., and that this $2,195,032.89 has been paid out of gross earnings applicable, in the first instance, ONLY to operating expenses until all operating expenses are paid.

It is a fact that not a dollar has been paid to the St. L., A. & T. H. R. R. Co. for the use of the leased line from April 1, 1878, to October 26, 1878, and that only partial payment of rent has been made from October 26, 1878, down to July 26, 1882, and that the principal and interest of rent due on July 26, 1882, upon the basis of the minimum rent fixed by the lease, was $664,874.70, no part of which has ever been paid.

It is a fact that the C., C., C. & I. Ry. Co. did, on November 17, 1882, enter into a memorandum agreement for a new lease of the same railroad, property and franchises covered by the lease of September 11, 1867, and did, on February 23, 1883, enter into a new lease for ninety-nine years of said railroad, property and franchises in connection with the reorganized Indianapolis and St. Louis Railway Company.

Further, that by said new lease the C., C., C. & I. Ry. Co. did agree and covenant to pay the same minimum rent fixed by the old lease, viz: $450,000 per annum, in monthly payments of $37,500.

It is a fact that there are proceeds of sale undistributed far more than sufficient in amount to pay in full the principal and interest of the debt due to the St. L., A. & T. R. R. R. Co. for the use of its leased road and equipment.

Can a Court of Equity look at these facts and then hold that the St. L., A. & T. H. R. R. Co. is not entitled

to full payment out of the remaining proceeds of sale before any payment is made upon the bonds held by the C., C., C. & I. Ry. Co.?

Every principle of justice, equity and fair dealing requires full and complete payment to be made to the St. L., A. & T. H. R. R. Co. of the amount decreed due to it by the decree of July 26, 1882, in preference to and before the C., C., C. & I. Ry. Co. receives a single dollar on its second and third mortgage bonds.

V.

The St. L., A. & T. H. R. R. Co. is entitled to payment of $164,052.82, together with interest thereon from October 26, 1878,—the same being part of the aggregate amount decreed due by the decree of July 26, 1882,—out of the proceeds of sale of the railroad and property of the Indianapolis and St. Louis Railroad Company, because the said $164,052.82, and interest thereon, IS TRUST FUND MONEY *belonging to the St. L., A. & T. H. R. R. Co., collected, withheld and appropriated to its own use and benefit by the Indianapolis and St. Louis Railroad Company.*

As against the Indianapolis and St. Louis Railroad Company the decree of July 26, 1882, stands affirmed and remains in full force. As between the St. L., A. & T. H. R. R. Co. and the Indianapolis and St. Louis Railroad Company the lease of September 11, 1867, stands as a valid contract.

Penn. Co. v. *St. Louis, Alton, Etc., Railroad,* 118 U. S. 318.

Articles 7 and 8 of the lease of September 11, 1867, (Record, pp. 15, 17,) as nearly as language can do so, set apart 30 per cent. of the gross earnings *earned on the*

track of the leased line AS A TRUST FUND RESERVED TO THE LESSOR. No possible construction of the contract can transmute the withholding of this 30 per cent. of the gross earnings earned by the leased line on its own track, into an ordinary debt of the Indianapolis and St. Louis Railroad Company. If this 30 per cent. was not a clear and specific *reservation to the lessor*, the lease would not speak of the lessee as having "the *custody* of the accounts and of the income."

That rents definitely ascertained and specificially reserved by lease never become the property of the lessee, but vest directly in the lessor, and are simply held *in trust* by the lessee for the lessor, seems to be a well established principle in law.

Moulton v. *Robinson*, 7 Foster (N. H.) 551.
Hatch v. *Hart*, 40 N. H. 98.
Daniels v. *Browen*, 34 N. H. 454.
Hart v. *Baker*, 29 Ind. 200.
Lindley v. *Kelley*, 42 Ind. 294.
Parker v. *Garrison*, 61 Ill. 254.
1 Washburn on Real Prop., Sec. 10; Title, "*Estates for Years.*"

From April 1, 1878, until October 26, 1878, the Indianapolis and St. Louis Railroad Company held possession of, and constantly used, the leased line and equipment, but refused to pay any rent whatever. Not one dollar has ever been paid upon the rent for that seven months. No rent was paid from April 1, 1878, to December 16, 1878, at which last named date $28,655.10 was paid as the first payment under the order of the

Court compelling the Indianapolis and St. Louis Railroad Company to pay 30 per cent. of the gross earnings earned on the leased line from and after the entry of that order.

The Circuit Court by the decree of July 26, 1882, found and decreed that the Indianapolis and St. Louis Railroad Company received and withheld all of the gross earnings of the leased line from April 1, 1878, to October 26, 1878, and has never paid to, or for the benefit of, the St. L., A. & T. H. R. R. Co. any part of the 30 per cent. of the gross earnings received during said period. The Court also found and decreed that the amount of the 30 per cent. of gross earnings of the leased line during said period so received and withheld by the Indianapolis and St. Louis Railroad Company is $164,052.82. (See Appendix, p. 4.) This $164,052.82, together with interest thereon from the time it should have been paid, constitutes a large portion of the $664,874.70 decreed due to the St. L., A. & T. H. R. R. Co. by the decree of July 26, 1882.

Thirty cents out of every dollar earned by the leased line belonged to the St. L., A. & T. H. R. R. Co., the instant it was earned, as a reservation by the terms of the lease under which possession was obtained by the Indianapolis and St. Louis Railroad Company. When the Indianapolis and St. Louis Railroad Company, and its guarantors, deliberately determined to violate their contracts, they did not stop operating the leased line, surrender it and its equipment to the St. L., A. & T. H. R. R. Co. and cut off their business at Terre Haute as the western limit of their line. That would have been

to them disastrous. It would have ruined their through business and future prospects for trunk line business, and would instantly have cut off more than one-half,—nearly two-thirds,—of the gross earnings of the Indianapolis and St. Louis Railroad Company on its own line. Instead of doing that, they adopted the choking policy and undertook to bankrupt the St. L., A. & T. H. R. R. Co. and at the same time preserve their business and prestige as a through trunk line. To avoid hurt to themselves, and, at the same time, compel the St. L., A. & T. H. R. R. Co. to submit to a change of the contract in their interest or be driven into bankruptcy, they held possession of the leased line, continued using and operating it, and *kept all its gross earnings.* Not one dollar of this $164,052.82 has yet been paid. Can a Court of Equity say that this money, with interest thereon, ought not to be paid? Will a Court of Equity permit the Indianapolis and St. Louis Railroad Company to appropriate this money to its own use and benefit and to the use and benefit of its bondholders, and then refuse to require payment of it out of proceeds of sale? The entire sum thus wrongfully withheld, together with interest thereon, is justly due to the St. L., A. & T. H. R. R. Co., not as an ordinary debt, *but as trust money wrongfully retained and unlawfully appropriated to the use and benefit of the Indianapolis and St. Louis Railroad Company and its bondholders.*

The St. L., A. & T. H. R. R. Co. has only received $141,155.11 for the use of its one hundred and ninety-three miles of railroad, and its equipment, for the entire year 1878. (Record p. 78, Exhibit "S.")

Now let us see what the bondholders of the Indian-

apolis and St. Louis Railroad Company received during that same year. They received in bond interest $154,595.00. (Record p. 52, Exhibit "D," p. 78, Exhibit "S") They received in payment to mortgage bond sinking fund $5,810.00. (Record p. 53, Exhibit "F.") They received in additions and improvements to the mortgaged property $7,744.25, (Record p. 53, Exhibit "E.") making a total paid to, and for the benefit of, the bondholders in the year 1878 of $168,149.25.

But a computation upon the transactions of the two years 1878 and 1879, taken together, will better illustrate the fact that this trust fund reserved by the lease to the lessor has been not only wrongfully withheld and appropriated by the Indianapolis and St. Louis Railroad Company, but that this fund has gone directly into the pockets of the bondholders of the Indianapolis and St. Louis Railroad Company either in cash paid on bond interest, or in values added to the mortgaged estate. The reason that it is proper to take into this computation the two years 1878 and 1879 arises from the fact that the 30 per cent. of the gross earnings so wrongfully withheld by the Indianapolis and St. Louis Railroad Company came into its treasury too late to be expended for the benefit of the Indianapolis and St. Louis Railroad Company in improvements upon its mortgaged property until the following year. The year after it had wrongfully closed its hands upon $164,052.82 belonging to the St. L., A. & T. H. R. R. Co. as its 30 per cent. of the gross earnings on the leased line from April 1st to October 26, 1878, the Indianapolis and St. Louis Railroad company expended $130,477.60 in new

construction, improvement and equipment on its road from Indianapolis to Terre Haute, being almost as much as had been expended in the four years next preceeding 1878. (Record p. 53, Exhibit "E.")

The computation for the two years 1878 and 1879 is as follows:

Interest paid by the Indianapolis and St. Louis Railroad Company on mortgage bonds, (Record p. 52, Exhibit "D.")	$263,795.00
Amount paid to mortgage bond sinking fund during same period, (Record p. 53, Exhibit "F.")	5,810.00
Amount paid for new construction, additions, new equipment and improvements during same two years, (Record p. 53, Exhibit "E.")	138,221.85
Making total paid for benefit of bondholders during the two years,	$407,826.85

During this two years the total amount advanced to the Indianapolis and St. Louis Railroad Company by the bondholding guarantor companies was $95,306.24. (Record pp. 48, 49.) Subtracting these advances from the total amount paid out for the benefit of the bondholders during the two years, leaves a total received by, and paid out for the benefit of the bondholders, over and above all advances received from the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. of $312,520.61. Every dollar of this $312,520.61 was paid out of gross earnings received by the Indianapolis and St. Louis Railroad Company from the operation of the line from

Indianapolis to St. Louis, which gross earnings included the $164,052.82 wrongfully withheld from the St. L., A. & T. H. R. R. Co.

During this same two years,—1878 and 1879,—the St. L., A. & T. H. R. R. Co. only received $441,933.21 on rent for the leased line and equipment,—$8,066.79 less than the minimum rent for *one year*, according to the terms of the lease.

The bondholders of the seventy-one miles from Indianapolis to Terre Haute have received during these two years $312,520.61, over and above all advances made by the guarantor companies, every dollar of which $312,520.61 ought to have been applied to payment of rent due the leased line as part of the operating expenses of the Indianapolis and St. Louis Railroad Company; while the owners of the one hundred and ninety-three miles of the leased line have only received for the use of their road and equipment during the two years $441,933.21. Can a Court of Equity say that is equitable and right?

As before stated, there can be no doubt about the fact that the Circuit Court rendered the decree, the reversal of which is asked by this appeal, because the Court had already rendered the decree of July 26, 1882, for the same indebtedness. Does anyone doubt but that if the Circuit Court had believed the decree of July 26, 1882, would be reversed as to the guarantor Companies, it would have rendered a very different decree upon the intervening petition of the St. L., A. & T. H. R. R. Co. from the decree here appealed from?

The purpose of this argument has been to show,

First. That the St. L., A. & T. H. R. R. Co. is in equity entitled to just and fair compensation for the use of its railroad, equipment and franchises as upon *quantum meruit*, even if the lease is entirely disregarded.

Second. That the minimum rent of $450,000 per annum, in monthly payments of $37,500, is no more than just, fair and equitable compensation for the use of the leased line upon *quantum meruit.*

Third. That the St. L., A. & T. H. R. R. Co. is entitled to payment, of the $664,974.70 decreed due it by the decree of July 26, 1882, with interest thereon, out of the proceeds of the sale of the railroad and property of the Indianapolis and St. Louis Railroad Company in preference to payment of the mortgage bonds:

1. Because it is an unpaid *operating expense of the Indianapolis and St. Louis Railroad Company*, there having been gross earnings abundant to pay all operating expenses, including rent of the leased line.

2. Because it is a debt justly due to the St. L., A. & T. H. R. R. Co. *as a connecting line.*

3. Because gross earnings lawfully applicable *only* to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the St. L., A. & T. H. R. R. Co., in payment of bond interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt now due to the St. L., A. & T. H. R. R. Co. many times.

Fourth. That the C., C., C. & I. Ry. Co., in resisting payment of the debt due the St. L., A. & T. H. R.

R. Co. in preference to the payment of the second and third mortgage bonds, does not stand before a Court of Equity in the position of simply an ordinary bondholder; and that the peculiar relations existing between the C., C., C. & I. Ry. Co. and the Indianapolis and St. Louis Railroad Company, as disclosed by this litigation, greatly strengthen the equity in favor of the St. L., A. & T. H. R. R. Co. in its claim for preference in payment over the mortgage bonds.

Fifth. That the St. L., A. & T. H. R. R. Co. is entitled to payment of $164,052.82, with interest thereon, from October 26, 1882, out of the proceeds of sale, because that amount is 30 per cent. of the gross earnings earned on the track of the leased line from April 1, 1878, to October 26, 1878, and *is trust money reserved by the lease* belonging to the St. L., A. & T. H. R. R. Co., collected, withheld and wrongfully appropriated to its own use and benefit by the Indianapolis and St. Louis Railroad Company.

It can not be possible that a Court of Equity will permit the Indianapolis and St. Louis Railroad Company and its chief bondholder, the C., C., C. & I. Ry. Co., to appropriate to their benefit a sum of money now aggregating, with its interest, over $750,000 justly and equitably belonging to the St. L., A. & T. H. R. R. Co.

The St. L., A. & T. H. R. R. Co. asks that the decree here appealed from may be reversed, and that the Circuit Court may be directed to enter a decree providing for payment of the amount decreed due to it by the decree of July 26, 1882, out of the proceeds of sale of the railroad and property of the Indianapolis and St.

Louis Railroad Company remaining undistributed, in preference to payment of the second and third mortgage bonds: Or, if this Court shall be of the opinion that the amount decreed due to the St. L., A. & T. H. R. R. Co. by the decree of July 26, 1882, is excessive and more than a just and fair compensation for the use of its railroad, equipment and franchises; that in that event the decree appealed from may be reversed with directions to the Circuit Court to take additional testimony touching the fair and just amount that ought in equity to be paid to the St. L., A. & T. H. R. R. Co. for the use of its said railroad, equipment and franchises, and decree payment of the amount found due upon such further inquest out of the proceeds of sale in preference to the second and third mortgage bonds.

Respectfully submitted,

JOSEPH E. McDONALD,

JOHN M. BUTLER,

Solicitors for the St. L., A. & T. H. R. R. Co.

By JOHN M. BUTLER.

INDIANAPOLIS, IND., January 16, 1888.

APPENDIX.

Final Decree of the United States Circuit Court in Cause of St. Louis, Alton and Terre Haute Railroad Company vs. Indianapolis and St. Louis Railroad Company et al., Rendered July 26, 1882.

"Now on this day comes the complainant, by its solicitors, and come the defendants, The Indianapolis and St. Louis Railroad Company, The Lake Shore and Michigan Southern Railroad Company, The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, The Pittsburgh, Fort Wayne and Chicago Railway Company, The Pennsylvania Railroad Company, and The Pennsylvania Company, by their respective solicitors; and on the complainant's motion it is ordered that complainant's bill be dismissed as to said defendant, The Indianapolis, Cincinnati and Lafayette Railroad Company; and the said several defendants above named, appearing herein by their said solicitors, withdraw all question made by the answers of said defendants, or either of them, or any other pleadings in this cause, or any evidence taken in the same, as to the jurisdiction of this Court over the person of the parties hereto, or any of them. And this cause coming on to be heard for final decree upon the bill of plaintiff, the respective answers thereto filed by the Indianapolis and St. Louis Railroad

Company, the Lake Shore and Michigan Southern Railroad Company, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the Pittsburgh, Fort Wayne and Chicago Railway Company, the Pennsylvania Railroad Company, and the Pennsylvania Company, the several replications to said answers, the several exhibits filed in said cause, and the evidence taken and reported, and the Court being fully advised in the premises, upon consideration thereof doth find, adjudge and decree that the equity of this cause is with the complainant as against the said defendants, The Indianapolis and St. Louis Railroad Company, The Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, The Lake Shore and Michigan Southern Railroad Company, The Pittsburgh, Fort Wayne and Chicago Railway Company, The Pennsylvania Railroad Company, and the Pennsylvania Company. And the Court further finds, adjudges and decrees as follows:

"*First.* That the lease and operating contract of September 11, 1867, mentioned and set forth in complainant's bill of complaint, is a legal, valid and binding contract between the parties thereto.

"*Second.* That the agreement of guaranty, dated the 11th day of September, A. D. 1867, mentioned and set forth in complainant's bill of complaint, is a legal, valid and binding contract by and between the parties thereto; that by the terms of said agreement of guaranty the liability thereunder is several and not joint; that the liability of the Pittsburgh, Fort Wayne and Chicago Railway Company under said agreement of guaranty, as the party of the second part thereto, is for the equal

one-third part of any and all damages arising from any default of the said Indianapolis and St. Louis Railroad Company, its successors or assigns, in the full performance of each and every of the conditions and stipulations of the said lease and operating contract of September 11, 1867; that the liability of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company (the successor of the Bellefontaine Railway Company, and the Cleveland, Columbus and Cincinnati Railroad Company,) and the Lake Shore and Michigan Southern Railroad Company, (the successor of the Cleveland, Painesville and Ashtabula Railroad Company and the Lake Shore Railroad Company) jointly constituting the party of the third part in said agreement of guaranty, as for the equal one-third part of any and all damages arising from any default of the said Indianapolis and St. Louis Railroad Company its successors or assigns, in the full performance of each and every of the conditions and stipulations of the said lease and operating contract of September 11, 1867.

"*Third.* And the Court further finds, adjudges and decrees that there is now due to the complainant from the Indianapolis and St. Louis Railroad Company of the minimum rent reserved by the said lease of September 11, 1867, up to July 1, 1882, the sum of five hundred and forty-one thousand three hundred and fifty-eight and 23-100 dollars ($541,358.23) as principal, which said principal sum due on minimum rent reserved by said lease is here now in open court agreed to be correct by each and every of the parties hereto; and the Court finds that the complainant is entitled to interest upon

the amount so found due it for rental from the time the same became due under the terms of said lease, and that such interest up to this date amounts to the sum of one hundred and twenty-three thousand five hundred and sixteen and 47-100 dollars ($123,516.47), making the total amount due complainant, principal and interest, as aforesaid, the sum of $664,874.70.

"It is therefore ordered and decreed that the said defendant, The Indianapolis and St. Louis Railroad Company, do, within sixty days from and after the date of this decree, pay the said complainant the said sum of six hundred and sixty-four thousand eight hundred and seventy-four and 70-100 ($664,874.70) dollars in full of amount due complainant, as aforesaid under the terms of said lease.

"And the Court further finds that the said defendant The Indianapolis and St. Louis Railroad Company, collected and received the entire gross earnings of that portion of complainant's railroad embraced and described in said lease from the 1st day of April, 1878, until the 26th day of October, 1878, and has never paid to or for the benefit of the said complainant any part of the 30 per cent. of the gross earnings received as last aforesaid.

"And the court further finds that thirty per cent. of the gross earnings of the said leased line so collected, received, and withheld by the said defendant, the Indianapolis and St. Louis Railroad Company, from said 1st day of April, 1878, until the 26th day of October, 1878, amounts to the sum of one hundred and sixty-four thousand and fifty-two and 82-100 dollars ($164,052.82,) the same being a part of the aggregate amount herein due.

"*Fourth.* And the Court further finds, adjudges and decrees that the Pennsylvania Railroad Company herein, as lessee of the Pittsburgh, Fort Wayne and Chicago Railway Company, by virtue of its contract and stipulations with said Pittsburgh, Fort Wayne and Chicago Railway Company, is bound by the terms of the said agreement of guaranty of September 11, 1867, and is obligated to make good the stipulations therein contained made by the said Pittsburgh, Fort Wayne and Chicago Railway Company.

"It is therefore ordered, adjudged, and decreed that the Pittsburgh, Fort Wayne and Chicago Railway Company and the said Pennsylvania Railroad Company, its lessee, do pay to the complainant, the one-third part of whatever sum of said $664,874.70 found and decreed due from said Indianapolis and St. Louis Railroad Company for and as the unpaid minimum rent reserved by said lease which may remain due and unpaid by said Indianapolis and St. Louis Railroad Company at the expiration of sixty days from and after the date of this decree, and for and in full payment and discharge of the liability of said Pennsylvania Railroad Company as aforesaid for the said Indianapolis and St. Louis Railroad Company for and on account of default aforesaid of the said Indianapolis and St. Louis Railroad Company under said lease.

"And the Court further finds that the bonds and stock of the Pennsylvania Company are all held and owned by the Pennsylvania Railroad Company, and that their interests are substantially identical, and that the same equity exists in complainant against the said Penn-

sylvania Company as against the Pennsylvania Railroad Company.

"It is therefore ordered, adjudged, and decreed by the Court that until the payment aforesaid ordered to be made by the Pittsburgh, Fort Wayne and Chicago Railway Company and the Pennsylvania Railway Company is made in full said two last named companies and the said Pennsylvania Company shall be, and are hereby, enjoined and restrained from receiving any dividends on any stock or interest or principal on any bonds of said Indianapolis and St. Louis Railroad Company now held by them or either of them.

"The Court further finds, adjudges, and decrees that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Lake Shore and Michigan Southern Railroad Company, jointly as one party thereto, are bound by the said agreement of guaranty of September 11, 1867, and that they jointly do pay, or cause to be paid, to the complainants the one-third part of whatever sum of said ($664,874.70) found and decreed due from said Indianapolis and St. Louis Railroad Company to complainant on the minimum rent reserved by said lease which may remain due and unpaid by said Indianapolis and St. Louis Railroad Company at the expiration of sixty days from and after the date of this decree, as and for and in full payment and discharge of the joint liability of said Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and said Lake Shore and Michigan Southern Railroad Company as guarantors for the Indianapolis and St. Louis Railroad Company under said lease, for the default aforesaid of

the Indianapolis and St. Louis Railroad Company under said lease; and until such payment is made in full said two last-named companies shall be and are hereby enjoined and restrained from receiving any dividends on any stock or interest or principal on any bonds of said Indianapolis and St. Louis Railroad Company now held by them, or either of them."

Certified copies of order appointing John H. Devereux Receiver of the Indianapolis and St. Louis Railroad Company: Final decree of foreclosure and sale of the Indianapolis and St. Louis Railroad, property and franchises; and bond securing payment of purchase money bid at foreclosure sale of Indianapolis and St. Louis Railroad, property and franchises; said order, decree and bond being entered of record in the cause of "Hinman B. Hurlbut, Trustee, v. The Indianapolis and St. Louis Railroad Company," in the Circuit Court of the United States for the District of Indiana.

"HINMAN B. HURLBUT,
Complainant,
vs.
INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY.
} Chancery. No. 7418.

"And now, on this day, the Court being sufficiently advised, upon the motion of the complainant for the appointment of a Receiver, heretofore submitted to the Court upon the bill and exhibits, filed by the said complainant, and the answer of said defendant, and the affidavits, filed by said complainant and said defendant, and the Court having heard argument thereon:

"It is ordered and decreed by the Court, that John H. Devereux be appointed, upon giving security in the

sum of one hundred thousand dollars ($100,000) Receiver herein, to take possesion of the money and assets, real and personal, road-bed, road, iron, ties, lands, right of way, mines, rolling stock, leases, franchises, and all other rights and property whatsoever of the said Indianapolis and St. Louis Railroad Company, wherever the same may be found, with power to manage, control and exercise all the franchises whatsoever of said railroad company, and with power to prosecute, defend and continue all suits brought by or against the said railroad company, whether heretofore or hereafter commenced, and whether in the name of said railroad company or otherwise; to defend all suits brought against him as such Receiver, or affecting his Receivership, and to bring such suits in the name of said railroad company as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing and protecting the assets, franchises, property and rights of said railroad company.

"And it is further ordered that the said defendant, the Indianapolis and St. Louis Railroad Company assign, transfer and deliver over to such Receivor all the property, real and personal, wheresoever found, and all contracts for the purchase of land, and all leases of railroads, and all contracts with other railroad companies, and all other equitable interests, things in action, and all other effects which belong to or were held in trust for said defendant, the Indianapolis and St. Louis Railroad Company, or in which it has any beneficial interest, and that said defendant deliver over in like manner all books, vouchers, accounts and records belonging to said Indianapolis and St. Louis Railroad Company.

"And it is further ordered that said Receiver have full power and authority to inquire after, receive and take possession of all such property, debts, equitable interests, things in action, and other effects, and for that purpose to examine said defendant, its officers and such other persons as he may deem proper, on oath, before the Master of this Court, from time to time, as he may deem necessary,

"It is further ordered that the said Receiver is hereby required and directed, as such Receiver, to keep a full and accurate account of all his acts and doings as such Receiver, and to report the same to this Court, from time to time, as he may be hereafter directed by order of this Court, and in the meantime and until otherwise ordered by the Court, to run, operate and manage the railroad of the said defendant Railroad Company, and to manage and control all the property and affairs of said defendant Railroad Company, including the railroad now held and operated by said defendant under a lease from the St. Louis, Alton and Terre Haute Railroad Company. But it is expressly provided that nothing in this order shall in any manner effect the right of the St. Louis, Alton and Terre Haute Railroad Company to require the payment of thirty (30) per cent. of the gross earnings of said St. Louis, Alton and Terre Haute Railroad, monthly, to said lessor, according to the order of the Court heretofore made and now in force, in the suit of the St. Louis, Alton and Terre Haute Railroad Company vs. The Indianapolis and St. Louis Railroad Company (No. 6257 of this Court), and the Receiver herein shall comply with the terms of said order in said last named cause.

"And said Receiver is hereby authorized and empowered to employ such counsel and attorneys, as he may deem necessary, to manage in his behalf such suits and other affairs as have arisen or may arise, and to advise such Receiver in relation to the performance of his duties therein.

"And it is further ordered, adjudged and decreed that said Receiver may use the moneys of said defendant Railroad Company for any and all the purposes stated in the foregoing provisions.

"And the said Receiver is ordered, within ten days from this date, to file in this Court a schedule of all the debts of said company, and this Court expressly reserves to itself the right and power to make such orders and decrees touching the payments of the debts of the said Indianapolis and St. Louis Railroad Company, incurred in the management and operation of said railroad prior to the appointment of said Receiver, as may be equitable and just.

"And said Receiver shall not borrow money or issue certificates of indebtedness except upon the order of the Court."

"In the Circuit Court of the United States.

DISTRICT OF INDIANA.

HINMAN B. HURLBUT,
Complainant.
vs.
THE INDIANAPOLIS & ST. LOUIS RAILROAD CO., *Defendant.*
} Decree.

"This day came the complainant by his attorneys of record, S. Burke and Baker, Hord & Hendricks, and the defendant came by its attorney and solicitor, John T. Dye, and thereupon this action came on to be heard to the Court upon the bill of complaint of the plaintiff, the answer of the defendant, the Indianapolis and St. Louis Railroad Company, the exhibits and testimony in the case, and was argued by the attorneys and solicitors of the parties.

"Upon full consideration and hearing of which action, the Court finds: That the allegations, statements and charges in the bill of complaint filed by the plaintiff as surviving Trustee are true. And the Court further finds that the first mortgage upon said railroad is for the sum of two million dollars. That it was executed under date of July 1, 1869, to Geo. W. Cass and Stillman Witt, as Trustees, a true copy of which mortgage is made a part of the bill of complaint as Exhibit "B," and the Court

further finds that the entire issue of bonds made by the said railroad company under said mortgage was two thousand of one thousand dollars each and that all of said bonds are outstanding and unpaid and constitute, together with the back interest or unpaid coupons thereon, the first lien upon said railroad, its road-bed, stations, equipments and real and personal property of every description. And the Court further finds that said mortgage was executed to secure the payment of said two thousand bonds of one thousand dollars each with interest warrants or coupons as in said mortgage stated, and that the principal sum secured by said mortgage will become due and payable in the year 1919. That said mortgage draws interest at the rate of seven per cent. per annum, payable semi-annually upon the first day of July and January of each year succeeding the date of said mortgage. That the interest warrants and coupons falling due up to and including the first day of May, 1882, have been paid in full except the sum of one hundred and thirty-one thousand, one hundred and ten dollars, due upon interest which remains wholly unpaid and the interest warrants or coupons securing the same remain outstanding, and the sum of two million dollars principal secured by said mortgage and the sum of one hundred and thirty-one thousand one hundred and ten dollars, ($131,110,) due upon the coupons or interest warrants secured thereby constitutes and is the first lien upon the railroad, its property and effects above mentioned. That said mortgage last mentioned was duly issued by the defendant and duly recorded as required by law and constitutes in all respects a valid ob-

ligation against the defendant. And the Court further finds that the mortgage in said bill of complaint mentioned, executed on the first day of October, 1870, to the Trustees, Thomas A. Scott and Oscar Townsend and made a part of the bill of complaint as Exhibit "C," constitutes the second lien upon the mortgaged premises and property described therein, being the railroad of defendant therein described, together with all its appurtenances and real and personal property of every kind and description. That the said mortgage last mentioned was made to secure the payment of one million dollars with interest thereon as shown by said Exhibit "C" and by said bill of complaint. That the said mortgage was intended to and does secure the payment of one thousand bonds issued by the defendant for one thousand dollars each, with interest from and after the first day of October, 1870, at the rate of 7 per centum per annum, the interest being payable semi-annually at the Union Trust Company in the City of New York, and the principal of said bonds to fall due on the first day of October, (1900) one thousand nine hundred. That the whole of said one thousand bonds are outstanding and unpaid, together with the interest thereon, except ($94,000,) ninety-four thousand dollars paid by the sinking fund, at the rate of seven per centum per annum payable semi-annually from the first day of January, 1878, and which sum of nine hundred and six thousand ($906,000) dollars, principal, and two hundred and ninety-one thousand, seven hundred and forty-five and ninety-seven one hundreths dollars, unpaid interest, making the aggregate sum of one million one hundred and ninety-seven thou-

and seven hundred and forty-five dollars and ninety-seven cents ($1,197,745.97) constitutes the second lien upon said railroad, its appurtenances and real and personal property described in said mortgage in said bill of complaint mentioned as Exhibit "C." That said last mentioned mortgage was in all respects regularly and legally issued and recorded and constitutes the second lien upon said railroad, its appurtenances and real and personal property of every name and nature. The property covered by said several mortgages as shown thereby being all and singular, the railroad of said Indianapolis and St. Louis Railroad Company constructed at the date of said last mentioned mortgage or thereafter to be constructed from Indianapolis in the State of Indiana, to the state line of Illinois at or near where the St. Louis, Alton and Terre Haute Railroad intersects the same or which should thereafter be acquired and appropriated for the purpose of a right of way for a single or double track railroad and all sidings and other tracks with all the appurtenances thereunto belonging and also all the lands acquired and appropriated, or which should thereafter be acquired and appropriated for tracks, depots, engine houses, car houses, station houses, warehouses, machine shops, work shops, superstructures, erections and fixtures, and also all and singular the franchises, rights and privileges, owned at the date of said mortgage, possessed or acquired by said Indianapolis and St. Louis Railroad Co. with the lands, tenements, hereditaments and real estate acquired and appropriated wheresoever and whatsoever, then owned by said party of the first part or which should thereafter be acquired or owned by it; and

also all and singular its locomotives, tenders, passenger cars, freight cars and all other cars, carriages, tools, machinery and equipments for said railroad and then owned or which should thereafter be owned or acquired by said party of the first part and also all goods and chattels owned at the date of said mortgage or which should thereafter be owned by said party of the first part and in any way relating or pertaining or belonging to or connected with said railroad or the running and operation of the same, together with all rents, issues, incomes, profits, money, rights, benefits and advantages derived or to be derived, had or received therefrom by said party of the first part, in any way whatsoever thereunto belonging or in any wise appertaining.

"The Court further finds that the defendant, The Indianapolis and St. Louis Railroad Company, in and by said indenture of mortgage, bound and obligated itself in every year, commencing from the first day of October, 1875, to reserve and pay over within ninety days after the expiration of the year to the parties of the second part, the trustees aforesaid, the sum of twenty dollars upon each bond secured by said last mentioned mortgage, being two per cent. upon the aggregate of the bonds thereby secured, and such additional sum as should be equal to the semi-annual interest upon such bonds as shall have been redeemed or purchased by the said trustees by the application of the sinking fund thereby provided, reference being had to the said mortgage for a more detailed statement of the obligation of the defendant in that respect. And the Court further finds that said last mentioned mortgage contained the

further condition; that is to say, that in case the said defendant, the Indianapolis and St. Louis Railroad Company should, for the space of ninety days, make default in the payment of the semi-annual interest to become due upon any or either of said one thousand mortgage bonds, and in the payments to the sinking fund provided for in said mortgage, or any of them, then after the lapse of said ninety (90) days the whole principal sum, mentioned in each and all of said one thousand mortgage bonds should forthwith become and be due and payable, and the lien or incumbrance created by said mortgage for the security and payment thereof in that event might be at once enforced, anything in said bonds or in the mortgage contained, to the contrary notwithstanding.

"And the Court further finds that the defendant has not at any time since January 1, 1878, paid over to the trustees mentioned in said mortgage, or to the complainant as the successor or surviving successor of said trustees, nor has it paid to any trustee, or person or persons or been ready to pay to the trustees or to the complainant or to any trustee or other person or persons, any money whatever upon account of the sinking fund provided for and stipulated to be paid in said indenture of mortgage last mentioned. And the Court further finds that the defendant, The Indianapolis and St. Louis Railroad Company, has utterly and entirely failed to pay any interest upon said bonds secured by said last mentioned mortgage since the first day of January, 1878, and that the coupons or interest warrants upon said bonds, at the rate of interest in said mortgage mentioned, are outstanding, and none of them have been paid since the

first day of January, 1878, and that the whole amount of interest in arrears upon said bonds, up to the second day of May, 1882, being the first day of this term, amounts to the gross sum of two hundred and ninety-one thousand seven hundred and forty-five and ninety-seven one-hundreths dollars ($291,745.97), no part of which has been paid, and no part of which the defendant has been ready or offered to pay; whereby, and by reason of the conditions of said mortgage, and the default of the said defendant to make payment according to the terms thereof, the whole amount of the principal of said bonds secured by the mortgage last mentioned, has become due and payable, making the aggregate sum due upon said second or last mentioned mortgage the sum of one million one hundred and ninety-seven thousand seven hundred and forty-five and ninety-seven hundreths dollars ($1,197,745.97), with interest thereon from the second day of May, 1882, being the first day of the term of this Court.

"And the Court further finds that the defendant did duly execute the indenture of mortgage mentioned in said bill of complaint, marked Exhibit "A." That said mortgage was duly executed to the trustees therein mentioned as stated in said bill of complaint, and that said last mentioned mortgage was made to secure the payment of five hundred bonds of one thousand dollars each, numbered from one to five hundred inclusive, together with eight per cent. interest thereon, to be paid semi-annually. That said mortgage was, in all respects, duly and legally issued and recorded as required by law. That said bonds, by their terms, fell due on the first day

July, 1881. That the interest warrants or coupons thereon have not been paid since the first day of January, 1878, and that the whole amount of principal and interest upon said bonds secured by said last mentioned mortgage, amounting to the aggregate sum of six hundred and ninety-nine thousand one hundred and sixty-four and seventy-six hundreths dollars ($699,164.76), is now due and unpaid, and constitutes the third lien upon said railway, its property, real and personal, above mentioned, and which is more particularly described in said last mentioned mortgage, to which reference is hereby made. That the plaintiff is the sole surviving trustee in said second and third mortgages upon said property, and as such, entitled to prosecute this action and to a decree of foreclosure as such trustee. And the Court further finds that by reason of the facts and premises aforesaid, that the complainant is entitled to a decree for the amount unpaid and due upon said several mortgages.

"And it is therefore ordered and adjudged by the Court: That upon default of the defendant, the Indianapolis and St. Louis Railroad Company, within ten days from the day of the entering of this decree, to pay to the Clerk of this Court said several sums of money due upon said mortgages constituting the second and third liens upon said railroad and real and personal property embraced in said mortgages, to-wit: the sum of one million, one hundred and ninety-seven thousand seven hundred and forty-five and ninety-seven hundredths dollars ($1,197,745.97) upon said mortgage constituting the second lien upon said property, and securing one million dollars and interest at seven per cent.

And the sum of six hundred and ninety-nine thousand, one hundred and sixty-four and seventy-six hundredths dollars ($699,164.76), the full amount outstanding due and unpaid upon the said mortgage constituting the third lien upon said railroad and real and personal property and interest thereon at eight per cent. from the first day of this term, constituting the aggregate sum of one million, eight hundred and ninety-six thousand, nine hundred and ten and seventy-three hundredths dollars ($1,896,910.73), and interest as found due upon the respective amounts found due at the rate of interest above found due by the Court. That a precept of sale and a copy of this decree upon the demand and at the request of the solicitors for the complainant or either of them be issued to William P. Fishback, the Master in Chancery of this Caurt, commanding him to advertise and sell to the highest bidder, according to law, the said railroad and all the appurtenances to the same belonging, subject only to the amount due upon the first mortgage upon said premises for principal and interest amounting as found by the Court to the gross sum of———— dollars. And it is further ordered by the Court that the premises and property so mortgaged and to be sold subject to the amount due upon said mortgage securing two thousand bonds of one thousand dollars each and interest due upon the same, is described as follows, to-wit: All and singular the railroad of the said defendant, the Indianapolis and St. Louis Railroad Company, extending from the city of Indianapolis, in the State of Indiana, to the city of Terre Haute, Indiana, where the St. Louis, Alton and Terre Haute railroad intersects

the same, and all sidings, stations, station-houses, depots, side tracks, switches, branches and all appurtenances thereunto belonging and also all the lands acquired and appropriated or owned by said railroad company for tracks, depots, engine houses, station houses, or other buildings or structures whatever, including car houses, store houses, work houses, machine shops, work shops, superstructures, erections and fixtures, and also all and singular the franchises, rights and privileges, now owned, possessed or acquired by said defendant, the Indianapolis and St. Louis Railroad Company, and all the lands, tenements, hereditatments and all real estate aquired and appropriated wheresoever and whatsoever and owned by said Indianapolis and St. Louis Railroad Company. And also all and singular the locomotives, tenders, passenger cars, freight cars, and all other cars, carriages, tools, machinery and equipments for said railroad; and also all goods and chattels, fuel, stationery, supplies, and all other real and personal property of every name or description; and all money, bills receivable, accounts, claims, choses in action, and personal and real property belonging to or connected with said railroad or the running and operating of the same, including the lease executed by the St. Louis, Alton and Terre Haute Railroad Company, of its line of railroad as described in said lease to said Indianapolis and St. Louis Railroad Company and hereinafter mentioned, with the right to operate said leased line of road in accordance with and upon the terms and conditions of said lease, together with all rents, issues, incomes, profits, rights, benefits and advantages derived, or to

be derived, had or received therefrom or in any way whatsoever belonging or pertaining to said Indianapolis and St. Louis Railroad, subject only to the amount due and owing and secured by the first lien upon said property as found and ascertained by this Court. It is further ordered by the Court: That the said property shall be sold at the north front door of the United States Court and Post Office Building in the city of Indianapolis, to-wit: the west door of said Court House on Market Street in said City. That before offering the same for sale, the said Master Commissioner shall advertise such sale in one or more daily newspapers, printed and published in the cities of New York, Indianapolis and St. Louis, for at least thirty days prior to such sale, such advertisement to be inserted in each of said papers at least once a week for at least four weeks preceeding the time fixed for such sale. It is further ordered and decreed by the Court that the property so ordered to be sold subject to said prior lien, shall be sold in gross and to the highest and best bidder. It is further ordered that the purchaser at such sale shall pay into Court to be applied upon the purchase money of said premises and property, the sum of one hundred thousand dollars upon the receipt of his bid upon the day of sale. And upon the refusal of the purchaser to pay to the Master the said sum of one hundred thousand dollars and to execute a bond to be approved by the Court for the payment of the residue of said purchase money as the Court may order, the bid and sale so made shall be void and the said property shall be again immediately offered by said Master or struck off to the

highest and best bidder complying with the order of this Court in the deposit and payment to the Master of said sum of one hundred thousand dollars. And it is further ordered and decreed by the Court that after the payment of said sum of one hundred thousand dollars, purchase money upon the sale of said premises by the purchaser thereof, that the residue of the purchase money, or such portion thereof as may not be required by the Court to be paid in cash shall be secured by a bond to be approved by the court, for the payment thereof, at such time or times as the Court may order. The Court reserves to itself the right by subsequent order or orders to distribute the proceeds of the sale of said railroad and property connected therewith and to make such further order and decree in regard to the distribution of the proceeds of sale as may to the Court seem just and equitable.

"It is further ordered that the costs of this proceeding and the fees and expenses of the Master connected with the sale of said property and the advertising expenses and all other legal and proper expenses connected with the sale and foreclosure of said mortgages shall be first paid out of the purchase money of said railroad and appurtenances and the balance applied as the Court shall direct and it appearing to the Court that the bonds and securities secured by said second and third mortgages and constituting the second and third liens upon said premises are held by divers and sundry people; it is ordered that before the payment and application of the proceeds of the sale of said mortgaged property upon said indebtedness, that the holders of said bonds shall deposit the bonds or coupons or other evidences of in-

debtedness held by them, with the Clerk of this Court for cancellation or indorsement of the amount paid thereon; and that no money shall be paid or credit given upon such bonds out of the proceeds of the sale of said premises or out of the purchase money thereof, until such bonds and coupons or other evidence or evidences of indebtednes shall have been deposited with the Clerk of this Court. It is further ordered by the Court, for the purpose of enabling all bond and security holders to prove their indebtedness against the proceeds of such sale of said mortgaged premises, or against said premises or otherwise, that the Court may be fully informed in respect to the indebtedness of said defendant company, that William P. Fishback be, and he is hereby appointed a Master Commissioner for the purpose of auditing the amount or amounts due to any bondholder, secured by said second or third mortgages. And that he is also authorized to hear evidence in support of all claims of indebtedness in behalf of any creditor, secured or not, of said defendant company. And he is hereby required to make his report of his findings, together with the evidence in support of each claim, from time to time, to this Court as he shall be ordered, and to take such further proceedings for the ascertainment of the amount of indebtedness, and the ownership of all claims and indebtedness against the said defendant company as the Court shall direct.

"And it is further provided that if said sum hereinbefore ordered to be paid shall not be paid within ten days the Master is ordered to proceed, without delay, to advertise and sell said road upon Friday, July 28, 1882, unless otherwise ordered by the Court."

BOND.

Know All Men by These Presents:

That we, the undersigned, E. B. Thomas, as principal, and Stevenson Burke, H. B. Payne, Charles Hickox, and Amasa Stone, as sureties, are held and firmly bound unto Noble C. Butler, Clerk of the United States Circuit Court for the District of Indiana, and his successors in office, in the sum of One Million Three Hundred Thousand Dollars ($1,300,000), lawful money of the United States, for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, representatives and assigns, firmly by these presents, without relief from valuation or appraisement laws.

The conditions of the above obligation being such that,

Whereas, on the twenty-eighth (28th) day of July, 1882, William P. Fishback, Master in Chancery of the United States Circuit Court for the District of Indiana, did sell, under a decree of said Court, entered on the twenty-second (22d) day of May, 1882, in a cause wherein Hinman B. Hurlbut, Trustee, was plaintiff, and the Indianapolis and St. Louis Railroad Company was defendant, all and singular, the real and personal property, rights and franchises of said defendant, the Indianapolis and St. Louis Railroad Company, and the said E. B.

Thomas became the purchaser thereof at a bid of One Million Three Hundred and Ninety-Six Thousand Dollars ($1,396.000.)

And, whereas, by the terms of said sale the purchaser of said property was required to pay One Hundred Thousand Dollars ($100,000) of the amonnt bid by him, in cash, to said Master on the day of sale, and afterwards, within twenty (20) days thereafter, execute a bond to the acceptance of said Court, for the payment of the remainder of the purchase money.

And, whereas, said E. B. Thomas did, in acceptance of the terms of sale, pay to said Master on the day of sale One Hundred Thousand Dollars ($100,000) of the purchase money.

Now, if the said E. B. Thomas shall, within a time to be fixed by said Court, by entry to be made of record in said cause, pay into the Clerk's office thereof, the remainder of said purchase price of One Million Three Hundred and Ninety-Six Thousand Dollars ($1,396,000,) to-wit: The sum of One Million Two Hundred Ninety-Six Thousand Dollars ($1,296,000), according to the terms of the decree rendered in said cause on the twenty-second (22d) day of May, 1882, aforesaid, then this obligation to be null and void, else in full force and effect.

Dated at Indianapolis, this twelfth (12th) day of August, 1882.

E. B. Thomas. [seal]
Stevenson Burke. [seal]
H. B. Payne. [seal]
Charles Hickox. [seal]
Amasa Stone. [seal]

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

I, Noble C. Butler, Clerk of the Circuit Court of the United States for the District of Indiana, hereby certify that the above and foregoing order appointing John H. Devereux, Receiver, the final decree of foreclosure, and the sale of the Indianapolis and St. Louis Railroad and franchises, and the bond given by E. B. Thomas and others to secure the payment of the unpaid purchase money bid at said foreclosure sale of the Indianapolis and St. Louis Railroad and franchises, are true and correct copies of the said order, decree and bond as the same remain upon the files and of record in said Circuit Court of the United States for the District of Indiana, in the cause of Hinman B. Hurlbut, Trustee, vs. The Indianapolis and St. Louis Railroad Company, numbered 7418 in Chancery.

Witness my hand and the seal of said Court this 23d day of December, A. D. 1887.

NOBLE C. BUTLER, *Clerk.*

125-655

FEB 13 1888

JAMES H. McKENNEY
CLERK

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1887.

THE ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY, APPELLANT,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY, APPELLEES.

No. 192.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF FOR APPELLEES,

BY

JOHN T. DYE.

GAYLOR & HOLLENBECK, Printers.

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No. 192.

Appeal from the Circuit Court of the United States for the District of Indiana.

BRIEF IN BEHALF OF APPELLEES,

BY

JOHN T. DYE.

STATEMENT OF THE CASE.

This is an appeal from the decree of the Circuit Court of the United States for the District of Indiana, upon the intervening petition of the appellant, the St. Louis, Alton and Terre Haute Railroad Company, seeking to interpose its

unsecured claim for rent of its road from April 1, 1878, to July, 1882, under a lease to the Indianapolis & St. Louis Railroad Company, before the lien of the mortgage bonds of the latter company upon the proceeds of the sale of its railroad under a decree of foreclosure.

There is no claim in the intervening petition that there are any earnings or income of the receivership out of which this claim can be paid, but it is sought to subject to its payment the proceeds of the mortgaged property itself. The claims arising out of the use of appellant's railroad by the receiver have been settled, and are not involved in this appeal.

Exhibit D (printed record, p. 33), filed with the intervening petition, setting forth the items of the account against the I. & St. L. R. R. Co., shows that the *appellant has already received for the use of its road during the time embraced in said account, from May 1, 1878, to July 17, 1882, being four years and two and one-half months, the sum of $1,371,141.76, which is, upon an average for said time, about $27,157 per month.* The appellant claims it should have received, under its lease, the sum of $37,500 per month, and sets forth that judgment has been rendered against the Indianapolis & St. Louis Railroad Company for the difference between the amount actually paid and the amount agreed to be paid by the terms of the lease, for the sum of $164,874.70, and seeks to have this judgment paid out of the proceeds of the sale before any payment is made upon the mortgage bonds held by these respondents.

This intervening petition does not rest upon any implied contract to pay a *quantum meruit* for the use of petitioner's road, but seeks to interpose before the mortgage bonds a claim for a balance due under an express contract of the Indianapolis & St. Louis Railroad Company as lessee, and sets up an alleged guaranty of that express contract by these appellees and others, which it is careful to recite has been adjudged to be valid and binding, and upon which judgments have been rendered against these appellees. It is not alleged in the

intervening petition that the use of appellant's railroad from April 1, 1878, to July, 1882, was worth any more than the sum which the petition shows appellant has already received since May 1, 1878, and with which the I. & St. L. R. R. Co. is credited in the account filed with said petition, to wit, $1,371,141.76—about $322,588.23 per year. (See record, p. 33.)

As stated by counsel for appellant, on page 10 of his brief, the pleadings and evidence in the record of the former appeal from the decree against these appellees as guarantors of this lease were put in evidence under this intervening petition, and by stipulation were not printed again. (See record, p. 93, and pp. 45 and 46.)

The Indianapolis & St. Louis Railroad Company was organized on the 31st of August, 1867, under the laws of Indiana, to construct and maintain a railroad from Indianapolis to Terre Haute, in Indiana, a distance of seventy miles. Amongst its promoters and stockholders were Charles Butler, president, Russell Sage, Robert Bayard and Samuel J. Tilden, directors of the St. Louis, Alton & Terre Haute Railroad Company, appellant herein. They afterwards transferred this stock to appellees. (See printed record in former appeal, p. 167.)

The St. Louis, Alton & Terre Haute Railroad was at the time the lease was made in bad condition and required immediate assistance to put it in order, and the contract was considered a favorable one to that company. (See testimony of H. C. Lord, former appeal, p. 181.)

A letter from Charles Butler, president of St. L., A. & T. H. R. R. Co., dated August 12, 1867, printed in former record, p. 171, to J. Edgar Thompson, president of the appellee, the Pennsylvania Railroad Company, shows that the appellant was anxious to make the contract of lease set forth in the intervening petition, and pressed the appellee, the Pennsylvania Railroad Company, to go on, when the latter declined to execute the second guaranty filed with the

intervening petition as Exhibit C. (See record, former appeal, p. 171.)

The Indianapolis & St. Louis Railroad Company built seventy miles of railroad, from Indianapolis to Terre Haute; it was accepted as lessee by appellant in the contract set forth in the intervening petition, dated September 11, 1867; it advanced $500,000, according to the terms of the lease, to put appellant's road in condition to do business; it paid its rent as it became due under said lease till April 1, 1878, when it failed to pay, and when demand was made of these appellees, as guarantors they insisted that the guaranty was not valid because the parties who asumed to execute the same in their behalf did so without authority; and, further, because their respective corporations had no power to make a contract subjecting the capital held by them under their charters for the maintenance and operation of their respective railroads to the maintenance and operation of another railroad in another State. The net earnings of the leased line, together with the net earnings of the lessor, were insufficient to pay the rental under the lease and the interest on the mortgage bonds of lessee, and these appellees from time to time made advances to the lessee and had become very large creditors of the I. & St. L. R. R. Co., the floating debt due them from said company amounting to $1,457,170.24.

At the time the lease was made there was but one railroad from Terre Haute to East St. Louis. "After the Vandalia," a rival and parallel line, "was built, and the business divided, *it changed the value of the lease very much*" (See testimony of H. C. Moore, superintendent of St. L., A. & T. H. R. R. Co., record in former appeal, p. 228.)

Up to April 1, 1878, the $500,000 had been advanced to put the leased line in order, and appellant had received its rent according to the terms of the lease, and, upon the failure of its lessee to pay, had the right to assume possession of its road.

Instead of doing this, it brought suit against the lessee and

these respondents as guarantors to "compel them to perform their respective obligations and undertakings," averring in the bill of complaint that the Indianapolis & St. Louis Railroad Company was in possession of its railroad, *and that the interests of appellant required that the possession of such lessee should not be disturbed.* (See paragraph 21, Bill of Complaint, printed record in former appeal, p. 11.)

In that suit an order was made requiring the Indianapolis & St. Louis Railroad Company to pay 30 per cent. of the gross earnings of the leased line into court monthly for appellant, and *the amount actually paid as rental for the use of the leased line, under that order of court, to appellant exceeded its net earnings, during the period covered by the account filed with the petition, from May 1, 1878, to July, 1882, by $692,067.69.* (See Exhibit T, p. 79 of record.)

The amount of rental received by appellant during this period has exceeded the entire net earnings of lessor upon its own line, and, also, upon the leased line, by the sum of $260,261.77. (See Exhibit R, p. 77 of record; also, Exhibit A of H. T. Nash, auditor of St. L., A. & T. H. R. R. Co., introduced in evidence by appellant, record, p. 50, and Exhibit D, p. 33.)

This evidence is uncontradicted. It is confirmed by the evidence introduced by appellant.

Exhibit Q, p. 76 of record, shows that the amount of rent already received by this lessor since the making of this lease is $6,464,869.19, while the total net earnings of the leased property are only $5,290,783.02, making *the amount of rent actually received by this lessor since the lease was made in excess of the entire net earnings of the leased property $1,174,086 17;* add to this the amount paid under the lease to put the property in condition, $500,000, and you have *$1,674,086.17 which has already been actually received by lessor under the terms of this lease in excess of the net earnings of the leased road.* And still it is not satisfied.

The minimum fixed by the lease for rental of the leased line

from June 1, 1867, to May 23, 1882, at $450,000 per annum, is $6,750,000, and 30 per cent. of the gross earnings for the same period is $6,031,465.61, falling short of the minimum rental by $718,534.39. Now, 30 per cent. of the gross earnings, $6,031,465.61, exceeds the net earnings, $5,290,783.61, by the sum of $741,582, and yet this clamor is made for $718,534.39 more, making a balance of rent claimed in excess of net earnings of $1,460,116.39. Add the $500,000 advanced to put the road in condition, and we have *$1,960,116.39, which appellant claims, together with what it has already received, in excess of the actual net earnings of the property under the lease.*

Appellees were not parties to the lease or operating contract of September 11, 1867, between the Indianapolis & St. Louis Railroad Company and the St. Louis, Alton & Terre Haute Railroad Company. They were only guarantors of a contract to which they were not parties and by which they acquired no legal rights.

They were stockholders of the I. & St. L. R. R. Co., but that does not make them responsible for its acts. They were large creditors of that corporation, but that certainly does not impair their rights as holders of its mortgage bonds.

These appellees received no money, property or thing of value belonging to the St. Louis, Alton & Terre Haute Railroad Company. The appellant asserts no such claim.

On the 17th day of May, 1882, in the suit to enforce the guaranty contract, the Circuit Court decreed that lease and operating contract and the guaranty were valid and binding; that these respondents were liable severally, and not jointly, each for one-third of the amount due under the lease. (Record, in former appeal, p. 155.)

On the 27th day of June, 1884, a decree was entered in this case in the Circuit Court as follows: "And the court being of opinion that the claim for rental prior to the date when the receiver took possession of the property is not a va n against the proceeds arising from the sale of the

property, the case is dismissed." (See record, p. 92.) From that decree this appeal was taken.

Subsequently this court decided that the lease of appellant's railroad to the I. & St. L. R. R. Co. was void for want of authority in said company to enter into such a contract, and that the guaranty of the lease by these respondents was illegal and void; and the judgments against these appellees as guarantors, recited in the intervening petition, were reversed. *Penn. R. R. Co.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290.

Counsel for appellant now files a brief admitting the lease and guaranty upon which the petition is based to be void, but insisting that "the St. Louis, Alton & Terre Haute R. R. Co. is entitled to the amount equitably due for the use of its railroad and franchises by the Indianapolis & St. Louis Railroad Company, as upon a *quantum meruit*, regardless of the lease of September 11, 1867."

ARGUMENT.

Counsel for appellant makes the following summary of the grounds on which he asks that the decree of the Circuit Court be reversed:

"The St. L., A. & T. H. R. R. Co. asks payment out of proceeds of sale of the debt *decreed due it by the decree of July* 26, 1882, for the use of its railroad and equipment by the Indianapolis & St. Louis Railroad Company.

"1. Because this debt is an *operating expense of the Indianapolis & St. Louis Railroad Company, payable out of the gross earnings of the entire line from Indianapolis to St. Louis*—the said gross earnings being sufficient to pay all operating expenses, including this debt as an operating expense.

"2. Because this debt is a *debt due to a connecting line*, and, *in common with all other dues to connecting lines*, is an operating expense of the Indianapolis & St Louis Railroad Company.

"3. Because *gross earnings received by the Indianapolis & St. Louis Railroad Company have been by it diverted to the benefit of its*

bondholders to such amounts as would have been far more than sufficient to have paid this debt." (See appellant's brief, p. 96.)

We answer:

1. *Debts wholly beyond and without the scope of corporate authority are illegal and not binding, and can not be treated as "current debts for operating expenses made in the ordinary course of business," within the scope of corporate authority.*

The petitioner having already received for the use of its road during the period covered by his claim from April 1, 1878, *$692,000 more than the total net earnings after the actual expenses for labor and supplies and repairs were paid,* now insists that he should have a lien for an additional sum by the terms of a contract which he admits to be void, prior to the lien of the mortgage upon the corpus of the road itself.

A railroad mortgagee in accepting his security does not agree that all debts made by the corporation *not in the ordinary course of business, and wholly beyond the scope of the powers of the corporation,* shall be paid before he shall be entitled to receive any portion of the proceeds of the mortgaged property upon his mortgage lien.

It has been held by this court in *Fosdick* v. *Schall,* 99 U. S. 235, that a railroad mortgagee in accepting his security impliedly agrees that *the current debts made in the ordinary course of business shall be paid from current receipts before he has any claim upon the income.* Counsel asks the court now to hold that every railroad mortgagee in accepting his security impliedly agrees that *debts wholly without and beyond the scope of corporate authority,* and which the directors of the corporation had no right to create, shall be paid from the current receipts before the mortgagee has any claim upon the income. This is equivalent to saying the mortgagee has no claim upon the income at all, if the directors of the corporation create debts in violation of their trust; that there is no wild scheme to which they may not commit the corporation

controlled by them, and that the mortgagees are wholly without any protection at law so far as the income of the property is concerned.

But counsel goes further than this. There is no question of income in this case. Appellant has already received more than the entire income, and now insists that the *corpus of the mortgaged property* shall be taken by this court from the mortgagees and handed over to pay a claim incurred *not in operating the I. & St. L. Road*, but for rental agreed to be paid by that road to the St. L., A. & T. H. R. R. Co., on the ground that this rental is a part of the operating expenses of the I. & St. L. R. R. He admits that the lease is void, but asks the court to do what it would have been illegal and against public policy for the I. & St. L. R. R. Co. itself to do.

Besides, this rental, which counsel calls operating expenses, is really the money which is going to the bondholders and stockholders of the St. L., A. & T. H. R. R. Co. after the operating expenses of that road have been paid. It constitutes the net earnings of that corporation, which counsel is seeking to insert as a lien upon the corpus of another corporation by calling it operating expenses of the other corporation. This rental is the fund with which the interest and dividends of the St. L., A. & T. H. R. R. Co. are paid. Counsel asks this court to give to the holders of the bonds and stocks of the St. L., A. & T. H. R. R. Co. a lien upon the property of the I. & St. L. R. R. prior to the mortgage bondholders of the latter company; that, too, in the face of the express decision of this court that the contract by which the road was leased is void and against public policy, and in face of the further fact that appellant has already received the entire net earnings of its own line and of the line of the lessee during the period covered by its claim.

The ground on which courts authorize managing receivers, *for the protection and preservation of trust property*, to pay debts due to employes, and limited amounts due to other and

connecting lines for unpaid ticket and freight balances, "*the outcome of indispensable business relations, and where a stoppage of the continuance of business relations would be a probable result in case of non-payment*" (*Millenberger* v. *Logansport Ry. Co.*, 106 U. S. 286), affords no standing place for counsel in this attempt, not to prevent a stoppage of business, or to preserve the trust fund, but to wrest the proceeds of the sale of the trust property from the mortgagees and turn it over to appellant, whose claim is based solely on an illegal contract, and who has already received much more than the total net earnings of its own line and that of the lessee for the period covered by its claim.

2. *As to claim that there has been a diversion of earnings.*

A computation is made, on page 90 of Mr. Butler's brief, from the time the road was built, leaving out of view wholly the fact that the lessee was entitled by the terms of the lease to all the net earnings up to April 1, 1878, when the default was made, in which he shows that the amount paid on interest, new construction, additions and new equipment by the I. & S. L. R. R. Co., since this lease was made, exceeded all advances made by the guaranteeing companies in the sum of over $2,000,000.

Now, it is conceded that appellant's rental was paid in full to April 1, 1878. Of course, no question can arise as to the earnings before that time. They were not diverted from the petitioner; they belonged to the Indianapolis & St. Louis Railroad Company, absolutely free from any claim of petitioner, and the net earnings of both lines during this period, up to January 1, 1878, amounted to $6,401,349.85. In order to show a diversion of net earnings since April 1, 1878, it is hardly necessary to include eleven years in which petitioner has received full rent and has no claim to earnings. The interest that was paid prior to April 1, 1878, is not a matter of which petitioner can complain.

As to the statement that the gross earnings were sufficient during the time covered by appellant's claim to pay all operating expenses, including claim of appellant as operating expenses, we have only to refer to Exhibit R, p. 77 and T, record, p. 79. The account of appellant extends from January 1, 1878, to May 23, 1882, when the road went into the hands of the receiver.

The rental paid and the operating expenses during that period exceeded the entire gross earnings of both lines, not including interest paid on first mortgage bonds, by $260,261.77, and the entire net earnings of its own line by $692,067.69.

3. *It is not a debt due for current ticket or freight balances to a connecting line.*

It is further urged that the amount due the St. L., A. & T. H. R. R. Co. for the use of its railroad equipment and franchises by the I. & St. L. R. R. Co. should be paid out of the proceeds of the sale in preference to the mortgage bonds, because it is a *debt due to a connecting line.* It is hardly necessary to stop upon this argument. The cases cited by counsel do not even tend in the slightest degree to sustain the position assumed by him. Indebtedness incurred by the directors of a corporation in violation of their trust, and wholly beyond their corporate authority, and therefore illegal and void, does not become valid and binding because it is due to a connecting line.

The fact that this claim is argued seriously ought to throw some light on the mental processes by which my zealous friend reaches the other conclusions which he reiterates with so much vehemence.

4. *As to the claim that, by the contract of lease, the rents from April 1, 1878, to October, 1878, were a trust fund:*

a. Even if the contract was not void, the holders of the second and third mortgage bonds have received none of this rent. They have received not one cent of interest since April 1, 1878.

b. If a mortgagor violates his trust this does not destroy the lien of the mortgagee nor affect the rights of the latter.

c. The petitioner, who claims the net earnings as a trust fund, has absolutely received more than the 30 per cent of the gross earnings of the leased line, and more than the net earnings of both lines, since January 1, 1878.

d. And, further, it is no trust fund. It is not a reservation of a specific thing as rent, but it is an agreement to pay a minimum of $37,500 monthly, and a sum equal to 30 per cent. of the gross earnings when they shall be ascertained. This is no trust. It is simply a contract to pay money, and a void contract at that.

e. And finally, when default was made, April 1, 1878, the appellant had a right to take possession of its road, but brought suit to compel its lessee to keep the road and perform its contract, and has since received $692,000 more than the entire net earnings of the leased property.

5. *As to the claim that "the C., C., C. & I. Ry. Co. does not stand before a court of equity in the position of an ordinary bondholder."*

In April, 1878, when the default by the I. & St. L. R. R. Co. was made, these appellees distinctly announced they would not be liable on the alleged guaranty. This court has decided that they were right in that course. The appellant makes no claim to any rent accruing before that time. It failed to take possession of its property, as it had the right to do, but attempted to compel its lessee to keep it. Since that time it has received $692,000 more than the entire net earnings

of its property, and now seeks to recover as much more on the ground that, though the guaranty contract was void, and it was the duty of appellees to their stockholders and the public to treat it as void, "*nevertheless the equities and moral obligations growing out of the relations assumed and positions occupied by reason of those contracts still remain*" (brief, p. 97); which, translated, means the guaranty contract was void, and, according to the decision of this court, the appellees did right to refuse to perform it on the 1st of April, 1878; still, nevertheless it ought to be enforced the same as if it was a valid contract; and notwithstanding appellant, since 1878, when it failed to take possession of its road, and resorted to the courts to enforce this void contract, has actually received $692,000 more than the entire net earnings of its own line, and, also, more than the entire net earnings of both lines, it ought still to have the price fixed by the void contract for the rent of its railroad during the time it was endeavoring to compel these appellees to keep and observe the illegal contract.

"A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract. *White* v. *Franklin Bank*, 22 Pick. 181 *Morville* v. *Am. Tract Society*, 123 Mass. 129, 137; *In re Cork* v. *Youghal Ry.*, L. R. 4, Ch. 748. But when the corporation has actually received nothing in money or property, it can not be held liable upon an agreement to share in or to guarantee the profits of an enterprise which is wholly without the scope of its corporate powers upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. *East Anglian Rys.* v. *Eastern Counties Ry.*, 11 C. B. 715; *McGregor* v. *Dover and Deal Ry.*, 18 Q. B. 618; *Ashbury Ry. Carriage and*

Iron Co. v. *Riche*, L. R. 7 H. L. 668; and *Thomas* v. *Railroad Co.*, 101 W. S. 271; *Downing* v. *Mt. Washington Road Co.*, 40 N. H., 230; *Franklin Co.* v. *Lewiston Institution for Savings*, 68 Maine, 43; *Davis* v. *Old Colony R. R.*, 131 Mass. 258."

This is not a proceeding to compel these appellees to refund any money or thing of value received by them.

6. *Even as against the lessee, if an express contract is illegal and void, an implied contract to do the same thing is equally void. The law will not imply a contract to do an illegal thing.*

"If a corporation makes a contract manifestly beyond the powers conferred by its charter, and, therefore, unlawful, a court of chancery, on application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation."

"*Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, and especially when all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the secretary of the Commonwealth a certificate showing the purpose for which the corporation is constituted.*"

"There was a clear distinction, as was pointed out by Justice Campbell in *Zabriskie* v. *The Cleveland, Col. & Ind'pls Ry. Co.*, 23 How. 381–398, by Mr. Justice Hoar in the *Monument Bank* v. *Globe Works*, 101 Mass. 51–58, and by Lord Hatherly in *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, L. R. 7, H. L. 668–684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice; and the abuse of a general power, or the failure to comply with prescribed formalities or regulations, in a particular instance when such abuse or failure is not known to the other contracting party."

Davis v. *Old Colony R. R.*, 131 Mass. 258.

Speaking with reference to this same guaranty contract, this court, quoting from its decision in *Thomas* v. *R. R. Co.*, 101 U. S., page 86, said: "Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and the public, give the plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in the execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

Pennsylvania Co. v. *St. Louis, Alton & T. H. R. R.*, 118 U. S. 317.

None of the cases cited to show that the court will sustain an action on a *quantum meruit* where the contract is void are cases where the contract was held void because it was not in the power of the corporation to make it.

The contract in the case of *Thomas* v. *Brownville R. R. Co.*, 109 U. S. 522–526, was void because of fraud, and not because the work which was performed under it was beyond the scope of the corporate authority. The same criticism applies to the cases *Gardner* v. *Butler*, 30 N. J. Eq. 724, and *Wardell* v. *U. P. R. R. Co.*, 4 Dillon, 339; same case, 103 U. S. 656.

It would be vain to hold that a railroad corporation could not divert its capital to an enterprise beyond the scope of its corporate authority, and then, because it had attempted so to do, to hold it liable upon an implied contract to pay a *quantum meruit* for an indebtedness created in the attempt to carry out this illegal undertaking.

7. *The question whether the I. & St. L. R. R. Co. would be liable upon a quantum meruit does not affect the rights of the guaranteeing companies.*

They did not use the road of appellant. There is no claim that they received any property or money belonging to appellant. On the other hand, it appears that these respondents have already advanced large sums of money to the I. & St. L. R. R. Co., which have never been repaid to them, and out of which the appellant has already received a large part of the rents for the period covered by its petition in this case, in excess of the earnings upon its own line and the line of the I. & St. L. R. R.

The I. & St. L. R. R. Co. now owes the Pennsylvania Company $583,585.12, and to the C., C., C. & I. R. R. Co. $873,585.12, making a total of $1,457,170.24 for advances; and during the whole period since January 1, 1878, these respondents have not received one cent on the bonds on which the road was foreclosed.

"Whatever may be said in regard to the Indianapolis & St. Louis Railroad Company, there is wanting in the case of the guaranteeing companies one of the strongest reasons usually urged in support of estoppel, as it is sometimes called, namely: that the recalcitrant party has received the money or property of the other. *For, so far from these guaranteeing companies having received of the plaintiff any money or property, they are the parties who have been paying money, and the plaintiff receiving it, for the rent of its road.* They are not, therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have heretofore done so. On the contrary, as we have already said, the duty of these directors to their stockholders is to cease to perform a contract by which they were never bound."

Pennsylvania Co. v. *St. Louis & Alton, etc., Co.*, 118 U. S. 317.

8. *Appellant's claim is without any foundation in justice or equity.*

The proof that was introduced on the question of diversion of earnings shows that, during the period covered by the account filed with the petition, the use of petitioner's road was of far less value to the I. & St. L. R. R. Co. than the amount of rental which has already been paid.

The default in interest was made April 1, 1878, and continued till the appointment of the receiver, May 23, 1882. During this period, covered by the petition, the amount of rental which was actually paid exceeds the combined net earnings of the line of the lessor and of the leased line by $260,-261.77, and it exceeds the net earnings of the leased line by $692.067.79. (See Exhibit R, record, p. 77, and I, p. 79.)

H. C. Moore, superintendent of appellant's railroad at the time of the making of the lease, testified on behalf of appellant (see printed record in former case, p. 228): *"After the Vandalia was built and the business divided it changed the value of the lease very much."*

Mr. Butler complains that the pool earnings were not credited to appellant, but the witness, Mr. Hewitt, distinctly swears they were credited to appellant in Exhibit S made by him. (See record, p. 81.) As to the claim that the operating expenses charged up from January 1, 1881, to May 23, 1882, are excessive, the auditor of appellant, in answer to questions asked by Mr. Butler, swears (record, p. 65) that they were so large "because there was charged in these expenses the final closing up of all expenses, including many that had occurred prior to that period."

It is idle for counsel, in the utter absence of evidence, to declaim as to the amount of operating expenses of 1881 and 1882. He had ample time and the fullest opportunity; and by his own auditor, after the most careful examination, he furnishes the tables which show that the appellant has received, since April 1, 1878, more than the entire net earnings of both lines;

more than 30 per cent. of the gross earnings of the leased line; and the respondents, the holders of the second and third mortgages, have received no interest during that time.

In conclusion we submit:

1. *Debts created by a corporation wholly beyond and without the scope of corporate authority are illegal and not binding, and can not be treated as current debts for operating expenses made in the ordinary course of business, which are entitled to be paid out of the income.*

2. "*These guaranteeing companies, having received of the appellant no money or property, but having been paying money, and the appellant receiving it for the rent of its road, they are not estopped from ceasing to pay any more money on an illegal contract.*" *Penn. Co.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 317.

3. *The appellant having already received as rent, under a lease void for want of corporate authority, and illegal as against public policy, during the period covered by its claim, since May 1, 1878, $692,000 more than the entire net earnings of its road, and $260,000 more than the entire net earnings of its own road and the road of the lessee, its claim is wholly without any foundation in justice or equity.*

Respectfully submitted.

JOHN T. DYE,

Of Counsel.

INDIANAPOLIS, IND., Feb. 10, 1888.

125-65

FILED
FEB 18 1889
JAMES H. McKENNEY
CLERK

In the Supreme Court of United States.

The [illegible] Company,

Appellant,

vs.

[illegible] Company,

Appellees.

Appealed from the Circuit Court of the United States for the District of Indiana.

No. 1[illegible].

Appearance for Respondents.

[illegible] Burnet.

In the Supreme Court of United States.

THE ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RAILROAD COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS & ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

Appealed from the Circuit Court of United States for the District of Indiana.

No. 192.

STATEMENT OF THE CASE.

The petitioner filed in 1882 an intervening petition in proceedings taken by the mortgagees to foreclose the second and third mortgages upon the Indianapolis & St. Louis Railroad.

The road was sold out subject to the first mortgage in July, 1882, and was purchased by Mr. E. B. Thomas.

The Indianapolis & St. Louis road covered by the mortgage extended from the city of Indianapolis to the west line of the state of Indiana, where it connects with the plaintiff's road which was leased many years ago by the Indianapolis & St. Louis Railroad Company.

The purpose of the intervening petition is to col-

lect rent in arrears due to the intervening petitioner from the Indianapolis & St. Louis Railroad Company, and the contention of the petitioner is, that it is entitled to payment of its rental out of the proceeds of the sale of the Indianapolis & St. Louis Railroad in preference to the holders of the bonds secured upon that property.

The Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company filed an answer to the intervening petition, which commences at page 31, (side paging) of the record, and which answer is a denial of all the equities of the petitioner in regard to payment out of the proceeds of the sale.

The Pennsylvania Company also filed an answer, which commences on page 38 of the record and which is substantially like the answer of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company.

The statement of facts by counsel for the intervening petitioner covers a very wide range.

The records however, are before the court and can be examined if necessary to establish any material fact about which the parties are in contention.

The real purpose and object of the petition is to establish the priority of the petitioner to the proceeds of the sale of the Indianapolis & St. Louis Railroad over the bondholders.

Briefly, this claim is made up on the ground that the rent of the petitioner's railroad was a part of the operating expenses of the lessees' railroad and that

operating expenses are entitled to payment before the interest or principal of the mortgage bonds, and that if interest has been paid for a series of years either from the income or money borrowed from the mortgagees or others, when the lessee finally fails and becomes unable to pay rent or interest the lessor may claim its rent out of the proceeds of the sale in preference to the bondholders, at least to the extent that interest has been paid from the income of the mortgaged premises at any time.

The proposition is that the rental upon the petitioner's railway, extending from East St. Louis to Terre Haute, Indiana, and there connected with the road of the lessee is, and always has been a part of the operating expenses of the Indianapolis & St. Louis Railroad and that the operating expenses, including this rental, must be paid before either the principal or interest upon the bonds can be paid, and if it turns out that the lessee for a series of years, say commencing in 1867 and coming down to 1878 inclusive, paid both the rental and interest, and it turns out afterwards, coming down to 1882, that the lessee is unable to pay both interest and rental, then in that case it becomes the duty of the court to look at the account from the beginning and if the court can ascertain that the income was insufficient to pay both the rental and interest upon the bonds that has been paid, when the mortgagee comes to foreclose his mortgage it is the duty of the court to subtract and take out of the proceeds of the mortgaged

property itself the amount which may be due for back rental, provided that amount does not exceed the whole amount of interest paid by the lessee company.

Another ground upon which relief is sought is that the income of the lessee company which should have been applied to the payment of rent, was not so applied and was used to pay interest and make improvements on the roadway and to equip the railroad of the lessee, and therefore the lessee should be preferred to the bondholders and paid first out of the proceeds of the sale.

In another form they state the proposition that the income of the lessee applicable to the payment of rent was diverted to other purposes by the lessee and this entitles the lessor to a priority over the bondholders.

Another ground upon which it is sought to recover a certain amount of back rental is that part of the rent claimed accrued within six months preceding the appointment of the receiver and that all debts contracted within six months preceding the appointment of the receiver are entitled to priority over the mortgagee.

The very elaborate brief submitted by Mr. Butler deals largely, perhaps chiefly, with propositions that were dealt with by this court in the case of the petitioner vs. the same parties in April, 1886, reported in 118 *U. S. Rep.* 290.

We do not deem it necessary for us to consider the question of the liability of the Pennsylvania and the

Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company as guarantors or original promisors or otherwise. All questions touching their liability as stockholders, guarantors or otherwise, were distinctly determined by this court in the action referred to, and the judgment of the court in that case is necessarily conclusive of the rights of the parties upon all the points involved, the whole purpose of that proceeding upon the part of the petitioner was to establish the liability of the Pennsylvania Company and others for the payment of the rent in question.

It was sought to establish that liability upon two grounds, 1st, the agreement of the several railroad companies in question to guarantee the ultimate payment of the rent due to the petitioner. This agreement was in writing and was fully considered by the court.

The liability was also sought to be established upon some general doctrine in equity, that the Pennsylvania Company and the Cleveland, Columbus, Cincinnati & Indianapolis Company were the equal owners of the stock of the Indianapolis & St. Louis Railroad Company, and that they as such stockholders had organized that company for the purpose of taking a lease of the petitioner's railroad, and that therefore they were indebted to the petitioner to the amount of the rental.

All these claims were swept away by the decision of this court above referred to. A petition or rehearing was filed in that case, and the questions under con-

sideration were fully considered by the court and the petition denied. We do not deem it important to re-argue the questions that were then decided.

A glance at the map will show that the Indianapolis & St. Louis Railroad extends from *Indianapolis to Terre Haute*, a distance of about 71 miles, and that the railroad of the petitioner leased by the Indianapolis & St. Louis Railroad Company extends from *Terre Haute to East St. Louis*, a distance of 187 miles or more.

The Indianapolis & St. Louis Railroad Company in 1878 became indebted to the petitioner in the sum of about $164,000 for rent accrued during that year. Immediately after this rent accrued the circuit court of the United States for the district of Indiana, upon the application of the petitioner required the lessee, the Indianapolis & St. Louis Railroad Company, to pay to the clerk of the United States circuit court from month to month 30 per cent. of the gross earnings of the petitioner's railroad between Terre Haute and East St. Louis. The lessee complied with this order up to the end of July, 1882, when the Indianapolis & St. Louis Railroad was itself sold out upon the petition of the trustees of its bondholders, and $500,780 on the rent in arrears accrued during the time that the leasehold property was practically in the hands of the court, and during which time, under the orders of the court, the lessee paid over to the petitioner through the clerk of the court 30 per cent. of the gross income or earnings of the leased railroad.

The obligation of the lessee to pay the additional sum of $500,780 during the period that the leasehold property was practically in the hands of the court rests *entirely upon the guaranty in its lease or operating contract that the gross rental would amount yearly to* $450,000.

It does not rest upon any obligation to hand over money actually received belonging to the petitioner, but rests altogether upon the contract obligation guaranteeing the minimum rent at $450,000.

The petitioner, in argument in this court as well as in the circuit court, took a distinction between the rent which accrued in 1878 and the rent which accrued between 1878 and 1882. We will notice that distinction further on.

It will be observed that the contention resolves into the consideration of the question—

1. *Is the rental guaranteed under the operating contract to the petitioner for its line of railroad between Terre Haute and East St. Louis a charge for operating expenses and maintenance of the lessee's line of railroad between Indianapolis and Terre Haute?*

Does such a charge growing out of the guaranty merely of the lessee company that 30 per cent. will amount to $450,000 a year, constitute what may be called *working expenses* incurred in the maintenance and operation of the lessee's line of railroad between Indianapolis and Terre Haute?

We hold the negative of this proposition.

2. *Is the rental growing out of such a contract and guaranty anything more than an open unsecured indebtedness of the lessee company, to be liquidated like any other indebtedness of that company?*

3. *If it is something more than an ordinary indebtedness, is it a lien upon the corpus, the right of way, roadbed, superstructure and equipment of the Indianapolis & St. Louis Railroad, and is such lien superior in equity to the lien of the second and third mortgage bonds?*

We have considered these questions all to be well settled.

The petitioner urges two considerations:

1st. That the Cleveland, Columbus, Cincinnati & Indianapolis and Pennsylvania Companies induced the petitioner to lease its railroad to the lessee and that they made certain representations and promises in regard to the lessee company.

2nd. That the Cleveland, Columbus, Cincinnati & Indianapolis and the Pennsylvania Companies are and have been for a long time the only stockholders and almost the only bondholders of the lessee company, and that these considerations change the case and give the petitioner priority in equity in the distribution of the proceeds of the sale of the railroad and property of the lessee company.

All these considerations were submitted to the court in the case of the petitioner against the same parties reported in the 118 *U. S. Rep.* 293.

It there appeared that the *only* obligation assumed by the Cleveland, Columbus, Cincinnati & Indianapolis and associate companies in respect to the lease was their contract in writing by which each for itself and for a certain proportion of the deficiency, guaranteed that the Indianapolis & St. Louis Railroad Company would pay its rental and comply with the other terms of the lease or operating contract.

This court upon a full and careful investigation twice held that the lease or operating contract was void, and it further held that whether that contract was void or valid that the contract of the other guaranteeing companies was null and void because neither of them had any lawful authority to guarantee such obligations. As the obligation, whatever it was, of the guaranteeing companies was in writing, so that their relation to the lease was specifically defined, and the evidence of what they each promised to do was embodied in the contract of guaranty, the court held that such contract measured their liability and that when that contract turned out to be null and void, that they were not liable to the lessor for its unpaid rental.

In considering the questions that we have submitted in this case, we may safely exclude and leave out of our consideration all the obligations and contracts that were discussed and considered in the case already decided.

There is no statute or law of Indiana or any of the other states which would make the guaranteeing com-

panies or either of them liable for the rental due to the petitioner simply because they are stockholders in the lesse company, nor would they become liable for such rental by being bondholders of the lessee, nor would they become liable upon a contract between the lessee and the lessor for rental upon the ground that they requested or solicited the lesser to enter into the operating contract in question.

In short, there is nothing in the record in this case to show that in law or in equity the guaranteeing companies are liable, or that they should be held liable directly or indirectly, except in so far as their written contracts and obligations should hold them.

Before considering the question as to whether the claim of the petitioner belongs to the class of cases in which courts of equity sometimes when dealing with labor claims and materials, give the equitable preference to such claimants, we desire to call the attention of the court to some of the pecuniary results involved in the transaction in question and which clearly appear in the record.

The evidence taken by the petitioner shows that between August 12th, 1875 and November 22d, 1881, the Cleveland, Columbus, Cincinnati & Indianapolis Railroad Company loaned and advanced to the lessee in various sums a total amount of $883,585.12, and that the Pennsylvania Comyany during the same period loaned and advanced to the lessee $583,585.12, and that these large sums of money remain unpaid; also that the

lessee company, from January, 1870, to 1882, inclusive, earned upon its own railway between Indianapolis and Terre Haute, the gross sum of $6,763,366.93, and that it earned net during that period $2,160,391.03; that the total gross earnings of the leased railroad between *Terra Haute and East St. Louis* from 1867, when the lease took effect, and 1882, inclusive, aggregate $20,104,885.38; that its net earnings were $5,290,783.02; that 30 per cent. of the gross earnings would amount to $6,031,465.61, being $740,682.51 more than its net earnings, so that the net earnings actually fell short of the 30 per cent. of the gross earnings $740,682.51.

The total rent that accrued under the lease during the same period was $6,751,500, that is counting the rent at the minimum of $450,000 a year, or $1,450,716.98 *more than the entire net earnings of the leased road.*

Of this the lessee paid $6,464,869.19, or $1,174,086.17 *over and above all the net earnings of the leased railway*, and which was $433,403.58 more than the 30 per cent. of the gross earnings agreed to be paid by the terms of the lease.

These figures are instructive, and a reference to them ought to end the debate in this case. They clearly show that any balance due the petitioner is *not to be paid out of any fund derived from any property belonging to the petitioner, nor yet from the 30 per cent. of the gross earnings* agreed to be paid under the lease or operating contract, but that the balance due grows out of that provision of the contract of lease which

guarantees that the net earnings will amount in each year to $450,000 at least, and that the debt of the petitioner, although justly due on contract, is not in any sense a debt due for money received in any manner to the petitioner's use, or by the expenditure of which money the property of the lessee between Indianapolis and Terre Haute has been to any extent benefitted, The obligation held by the petitioner is an obligation for which neither the lessee company nor anyone else has ever received any consideration whatever. *It is a contract obligation merely*, growing out of the part of the operating contract which guarantees that the 30 per cent. of the gross earnings will amount to $450,000 yearly, but it rests on no special equity.

The obligation certainly is not higher than it would be if the petitioner had from time to time loaned to the lessee various sums of money aggregating the amount of the unpaid rental. Indeed it would be difficult to maintain that it stands upon as high a ground, because if the money had been loaned to the lessee it very likely would have been expended in improvements upon its railroad and additional rolling stock, and in that way the security of the bondholders would have been increased, but as the lessee received no pecuniary consideration whatever, it was impossible that the security of the bondholders could have been in any way increased by the creation of the debt in question.

With these preliminary statements we are brought to the consideration of the first question:—Does the claim for back rental due to the petitioner and which grows entirely out of that provision in the operating contract which guarantees that the 30 per cent. of gross earnings will amount to $450,000 yearly, stand upon any higher ground than an ordinary debt for money loaned? Does it belong to the class of claims which are sometimes preferred to the claims of bondholders?

We hold the negative of this proposition.

In the consideration of this question we think we may safely assume that the case is not altered in the least by the fact that the Cleveland, Columbus, Cincinnati & Indianapolis and Pensylvania Companies are or were stockholders and for that matter the principal stockholders of the lessee company, or that they are or were bondholders of that company.

There is no intimation in the petition that the petitioner ever objected to the execution of any of the mortgages that were placed upon the property of the Indianapolis & St. Louis Railway Company.

There is no intimation that at the time the mortgages were made or at any other time that it ever in any way protested against the execution of such mortgages and the sale and disposition of the bonds secured thereby.

So far as we have any information the petitioner was at all times contented with the execution of the mortgages and with all the other acts and things done

and performed by the Indianapolis & St. Louis Railway Company.

The counsel of the petitioner have argued at great length, and we must say that they have not been overscrupulous in their use of facts to show the great benefit derived by the Cleveland, Columbus, Cincinnati & Indianapolis and Pennsylvania Railway Companies growing out of the use by the Indianapolis & St. Louis Railway Company of the lease-hold property. They are careful to point out the business that passed from the petitioner's road to the road of the lessee and *vice versa*. They fail, however, to notice the fact that the road of the lessor was quite as dependent upon the road of the lessee and its connections for business as they were upon the road of the lessee and its connections for business.

The truth is, as is well known to every intelligent man, that both roads were dependent upon each other and upon their connections for very much of their business, but this dependence was mutual, and the exchange of business was mutually advantageous and beneficial.

Upon what ground then can a distinction be taken between the debt which is due from the Indianapolis & St. Louis Railroad Company to the petitioner for the balance of so called rental growing out of the guaranty by that company that the rent would amount to $450,000 a year, and an ordinary debt for money loaned or for other proper considerations? We are unable to

see any ground for the distinction. The debt in question is not the debt of the bondholders or either of them. It is the debt simply of the Indianspolis & St. Louis Railway Company. It is not like claims for labor and supplies, a debt incurred for keeping the line between Indianapolis and Terre Haute a live or a going concern. It is not an indebtedness which in any way added to the security of the bondholders or by which to any extent their property was benefitted. It is not a debt which has by the course of judicial decision ever been held entitled to a preference.

The rules upon this subject have become reasonably well settled.

In order that the unsecured debts of a railroad company may take precedence of a secured debt as against the proceeds of the sale of the mortgaged property, something more is required than to show that the insolvent company is indebted. It must be shown substantially that the creditor is a creditor of the mortgagee; it must appear that the claim is a claim against the mortgagee; that the debt is the debt of *the mortgagee or the debt of the mortgaged property.* We do not mean to say by this that it must be shown that the mortgagee could be proceeded against in court upon such claim or such an indebtedness, but we do mean to say that it must appear that the property held as security, the mortgage fund, has been so benefitted and added to by the labor or property of the claimant as to give to the claimant the position of a *creditor in*

equity of the fund itself, and we may be allowed to say that in our judgment the courts have gone as far in this direction as they can consistently with the safety of investors in railway securities.

It is sufficient to say, however, that no case has ever gone to the extent claimed here. No court has ever yet decided that the rental of 187 miles of railroad under lease to a railroad company with but 71 miles of road has ever been held to be in any respect operating expenses of the character entitled to preference over mortgage bonds, nor has it ever been held that such rental is in any respect operating expenses of the road covered by the mortgage.

We can quite well understand what is meant by operating expenses of the *mortgaged premises*, the line between *Indianapolis and Terre Haute*, and what benefits the mortgage might receive by keeping the trains in operation and by keeping the railroad a going concern, instead of one where the business would be entirely suspended, but we cannot understand upon what principle the expenses of operating the line of railway, much less its rental between *Terre Haute and East St. Louis, a distance of* 187 *miles, can be called operating expenses of the line between Indianapolis and Terre Haute.*

We are totally without precedents in that line,—totally without authorities in support of any such position, and we are unable to see upon what principle the bondholder is to be displaced and deprived of his

security, and the unsecured rentholder with his debt growing entirely out of that part of the contract which guarantees that the 30 per cent. to be paid shall amount to $450,000 a year, is to be put ahead of the bondholder.

2. *Is the indebtedness to the petitioner entitled to preference over the claims of the bondholders?*

The case of *Fosdick vs. Schall, 99 U. S. Rep. 235*, is in point and decisive of the contention in this case.

In that case certain cars had been in use upon the railroad in question and prior to the appointment of a receiver rent to the amount of $14,568.75 had accrued for the use of the cars upon the railroad and the question was whether the rental of the cars was a prior claim and to be allowed as such upon any of the grounds urged in this case or in that.

The claim was disallowed by this court, the opinion being belivered by the Chief Justice,

Other questions were involved in that case unnecessary to be considered here,

On page 251 the Chief Justice states the rule as follows:

"We have no donbt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment

from the income during the receivership of outstanding debts for *labor, supplies, equipment, or permanent improvement of the mortgaged property* as may, under the circumstances of the particular case, appear to be reasonable. Railroad mortgages and rights of railroad mortgages are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting.

It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation. The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for supplies, labor, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom they in equity belong, and used to

pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this case the court will only do what, if a receiver should not be appointed, the company itself ought itself to do. For even though the mortgage may in terms give a lien upon the profits and income, until possession of mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors he need grant none. But if he calls upon a court of chancery to put forth its

extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion; and the chancellor should so mould his order that while favoring one injustice is not done to another. If this cannot be done, the application should ordinarily be denied. We think also that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, *additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies and the like,* it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustments of the accounts, so use the income which comes into its own hands as far as practicable, to

restore the parties to their original equitable rights. While, ordinarily this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts or current expenses, and use it to make permament improvements on the fixed property, or to buy additional equipment. In this way the *value of the mortgaged property* is not infrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a

greater or less extent influence the chancellor when he comes to act. *The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors.*

Whatever is done therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence.

In this case no special conditions were attached ot the order appointing a receiver in the circuit court of the United States; and it is not contended that the intervenor has brought himself within the rule fixed by the state court, in respect to the payment of general creditors. He asks to be paid a rent for his cars; but he entered into no express contract with the company which requires such a payment, and there is nowhere to be found any proof of an implied obligation to make such compensation. Two years and more before the appointment of a receiver by the state court, he contracted to sell his cars to the company at an agreed price, payable in installments, secured by what was in

legal effect was a paramount lien upon the cars. Payments were made according to the contract until October, 1874, when they stopped. The cars remained in use after that, not under a new contract of lease, but under the old contract of sale, The price agreed upon not having been paid in full, the power of reclaimation, which was reserved, has been exercised and sustained. The cars were not included in what was sold at the foreclosure sale, and consequently have contributed nothing directly to the fund now in court for distribution. So far as appears, no moneys growing out of the receivership remain to be applied on the bonded debt; and, if there did, through the rent already paid by receiver Anderson, full compensation has been made for all additions to that fund by means of the use of the cars. There is nothing to show that the current income of the receivership or of the company has been in any manner employed so as to deprive this creditor of any of his equitable rights. In short, as the case stands, no equitable claim whatever has been established upon the fund in the court. *Prima facie that fund belongs to the mortgage creditors*, and the presumption which thus arises has not been overcome. Schall, for the balance, his due, after his own security has been exhausted, occupies the position of a general creditor only."

The court thereupon reversed the decree in his favor.

There is nothing in this opinion which in any way would favor the claim of the petitioner in this case. Upon the contrary the reasoning of the court is entirely in conflict with the claim presented.

As we have seen, more than $500,000.00 of the indebtedness accrued during the time that the 30 per cent. of the gross earnings was paid over to the clerk of the circuit court at the instance of the petititioner and that the $500,000 and more, represents during that period the difference between the 30 per cent. of the gross earnings and the minimum $450,000 per annum guaranteed. It certainly cannot be said that this part of the indebtedness in any way added to the security of the mortgagees or that it can be classed as operating expenses. All that can be said of it is that it is an indebtedness arising upon contract for which there was really no consideration received by the lessee.

Tbe case of *Huidekoper vs. The Locomotive Works, 99 U. S. Rep. 258* is also in point.

In that case the Hinkley Locomotive Works enterered into a contract with the railroad company for the sale of three locomotives and afterwards for the sale of two more. By the terms of these contracts notes were to be given for the price, payable at stated periods, which might be renewed if required. The title to the locomotives was to remain in the vendars until the notes were paid. Afterwards the receiver filed his petition in court, setting forth the contract between the rail-

road company and the locomotive works, with a statement of the notes for the price then outstanding and unpaid. That on account of the peculiar construction of the engines they were not adapted to the business of the road and could not be economically used and that the locomotive company claimed title to the engines under their contract. He therefore asked authority from the court to surrender the engines to the locomotive works and to adjust, settle and pay for their use during and from the date of the receivership. On the same day the necessary authority for the restoration of the engines was granted and the receiver was instructed if it was done to receive the outstanding notes given for the price and deposit them with the clerk subject to the further order of the court. The locomotive company filed its petition in the cause, setting forth that the engines had been taken back and the notes deposited with the clerk. It then asked that the contracts and notes be referred to a master to ascertain and report the balance due upon them. The master reported that the engines were accepted by the railroad company under the contracts and used until the fall of 1875, when they were returned to the locomotive company in an injured condition; that they had since been sold to other companies at reduced rates and were worth when surrendered about one-half of what they were when put into the possession of the company. He closed by recommending the payment of $18,000 as a compromise settlement of the claim.

On the 14th of December, 1876, which was subsequent to the decree of foreclosure, but before the sale, after reading the report of the master, on motion of the solicitor of the locomotive company and with the consent of Fosdick and Fish and the railroad company, the court found due from the railroad company for the use of and repairs to the locomotives the sum of $15,793.75 and ordered the receiver to pay it to the locomotive company out of the moneys in his hands as soon as it could be done consistently with the operation of the road and the payment of claims theretofore ordered. At the time this order was made the intervening bondholders had been admitted as parties to the cause and it does not appear that their consent was obtained. On the 5th of January, 1877, they filed objections to the allowance of the claim on the ground that it was in the nature of a mere claim for money due on account before the appointment of a receiver for the railroad and that the bondholders had a paramount lien upon the earnings of the road and the proceeds of the sale. At the same time they filed a motion to set aside the order made December 14th for the payment of the claim. No payment was made by the receiver under the order, and on the 28th of April after the sale under the foreclosure and its confirmation, the matter came on again for hearing upon motion to set aside the order. This motion was overruled and a further order made for the payment of the amount which had been

found due out of the proceeds in court. From this last and final decree the bondholders appealed.

The court says: "We think this case is settled by that of Fosdick vs. Schall, *supra* 335. The amount found due the locomotive company is not in reality for the use and repair of the engines, but on account of what was agreed to be paid for the purchase. The railroad company contracted to buy the engines and pay a certain price. The locomotive company retained a paramount lien to secure the sum to be paid. The debt so incurred was not paid. The lien of the locomotive company has been in effect foreclosed and a balance of the debt still remains due, Whatever may have been the form of the transaction this is its substance. So far as we can see no equitable claim upon the fund in court has been established as security for this debt. The locomotive company occupies the position of a general creditor with no special equities in its favor."

Accordingly the order was reversed.

We suppose the law to be well settled that a definite and specific lien secured by mortgage is not to be displaced in order that a general creditor unsecured may be paid. When once a mortgage is made upon specific property and a specific indebtedness secured thereby, we hold it to be self evident that the mortgagee or bondholder cannot be deprived of his security without his consent. That is the substance of the opinion in Fosdick vs. Schall.

It is the basis, as intimated by the court in that case and in other cases of all the equitable orders that have from time to been made in connection with the foreclosing of railroad mortgages.

As was well observed by the court in the case last mentioned, if a mortgagee asks no special favors he is not obliged to grant any, He may foreclose his mortgage or take possession, if the terms of the mortgage admit of his taking possession of the property securing his debt, according to the terms of the mortgage and may subject in either form the property covered by the mortgage to the payment of his debt. If, however, he applies to a court of equity for the appointment of a receiver and asks the court for relief which is purely discretionary and equitable, the court may undoubtedly put him upon terms and may require that he should do equity in order to get equity.

The application for the appointment of a receiver in this case was made at the time of the decree of sale or shortly before. There was no receivership until that time or about that time. There were no earnings applicable to the payment of the debt in question or any other debt during the receivership. The property, according to the order of the court, was promptly sold and the sale promptly confirmed.

There is no pretense that the receiver received any income from the property during the receivership from which the petitioner's claim can be liquidated. If the

petitioner's claim is to be paid in preference to the bonds it requires that the court shall take the amount of the petitioner's indebtedness out of the small fund arising from the sale of the mortgaged premises and hand that money over to the petitioner.

Upon what grounds this can be done we are utterly unable to see.

These principles are well stated by the court in the case of *Miltenberger vs. Logansport Railroad Company 106 U. S. Rep. 286 and 107 U. S. Rep. 591.*

There is nothing in the case of the Union Trust Company vs. the Illinois Midland Railway, 117 U. S. Rep. 434 which in any way conflicts with the principles enunciated in the case of Fosdick vs. Schall nor which in any respect supports the claim of the petitioner in this action.

Indeed it may be said with perfect propriety and safety that there is nothing in any of the decisions of this court or any other court holding that such a claim as that held by the petitioner arising merely for liquidated damages upon a contract, can be put ahead and preferred in its payment to the claim of bondholders properly secured by mortgages in all respects legally executed.

There is nothing in the case of Burnham vs. Bowen, 111 U. S. Rep. 776, which supports the case of the plaintiff.

The principles established in Fosdick vs. Schall,

supra, were simply applied in this case in regard to a claim for fuel.

The court is careful to remark in that case on page 783, "we do not now hold any more than we did in Fosdick vs. Schall or Huidekoper vs. Locomotive Works, 99 U. S. 258-260, that the income of a railroad in the hands of a receiver for the benefit of mortgage creditors who have a lien upon it under their mortgage can be taken away from them and used to pay the general creditors of the road. All we then decided and all we now decide is that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been improperly applied to their use."

There is nothing in any of the foregoing cases which in the least sustains or tends to sustain the position that a claim of the character of the petitioner's claim is to be preferred to the claims of bondholders.

There is nothing in the cases referred to which shows that a claim growing out of a guarantee of rent will be regarded as a preferred claim.

That is the case we have to deal with here.

Let us suppose that the lessee leased the railroad in question and appropriated its whole income for the improvements of its property and paid no rent.

Let us suppose that the mortgagee with full knowledge of that fact files his bill to foreclose the mortgage

and takes his decree and sells the property out, asking for no receiver and asking for no other relief at the hands of the court than the order to sell the property covered by his mortgage.

Could it be maintained that under such circumstances the lessor would be preferred to the bondholder and that the lessor could successfully contend with the bondholders for the proceeds of the mortgaged property? It may be granted that that would be a case of hardship upon the lessor. All cases in which men are unable to collect their honest dues are cases of hardship and cases of hardship appeal strongly to the chancellor to his sense of equity. Still, chancellors are not at liberty to disregard the positive contracts of parties and to set aside the just claims of a mortgagee in order that an unsecured creditor may be paid. It must be borne in mind that the lien of a mortgagee is given him by contract; that the law requires its record, that not only the lessor in a case like this but other persons are bound to take notice of the fact that such a mortgage exists.

It is not pretended in the case at bar but what the petitioner had full information in regard to the second and third mortgages, and if such information was possessed, it ill becomes the petitioner to question the results which naturally follow when such a mortgage is foreclosed. Every one has notice of such claims, and if the lessor sees fit to allow his rent to fall in arrears to a party who may not be able to pay

his rent, he is in the position of any other creditor who trusts people who are unable to pay.

Courts can enforce contracts. They have no power to make them.

As we have seen, there is not a strong equity in this case.

The record shows that the Cleveland, Columbus, Cincinnati & Indianapolis and Pennsylvania Railway Companies advanced to the lessee company about fifteen hundred thousand dollars, no part of which has been repaid. The evidence clearly shows that the petitioner has received $740,682.51 more than all the net earnings of its road, and the evidence shows that the total rental which accrued prior to May 23, 1882, the date of the appointment of the receiver, was $6,741,500 at the rate of $450,000 a year, which was $1,450, 716.98 more than the net earnings of the leased road.

So that the lessee paid to the lessor $1,174,086.17 over and above the net earnings and $443,403.58 more that the 30 per cent. of the gross earnings agreed to be paid by the terms of the lease,—it being very clear that the petitioner has received at least $440,000 more than the 30 per cent. of the gross income of this property during the period covered by this contention.

The money not earned upon the road of the petitioner, as we have seen, was supplied by the stockholders of the lessee.

Under these circumstances the court can not say that there is any real ground in equity upon which those who have advanced so much money and lost it in the past should now be deprived of the security which the lessee and the lessor and all other parties acquainted with the transaction had full information in regard to.

The property covered by the second and third mortgages, as we have seen, sold for $1,396,000. The evidence shows that there was considerable of a floating debt, a debt approaching $500,000, falling within or nearly within the rule of this court in regard to maintenance and keeping the railroad a going concern.

That large indebtedness has, by order of the court, been paid up from the proceeds of the sale of the property, reducing the proceeds down to between eight and nine hundred thousand dollars. Of what remains it is now proposed by the petitioner to take out $664,000 and interest, making about $800,000 or practically all that remains. Of course if this claim can be maintained and its priority established nothing will be left for the bondholders.

It is true that the court ordered the property sold to pay the mortgage indebtedness. It is true that the court found that the three several mortgages were liens in their order, but if the petitioner is to prevail here nothing was gained by the foreclosure, and instead of the mortgagees foreclosing they might have left it to

the petitioner to come in and assert its claim and procure the premises to be sold upon its own account.

The sole ground that the petitioner has for maintaining anything in this action is that the lessee company agreed to pay a certain minimum rental and that it has not fully complied with its contract in that respect.

There is no equity in the petitioner's claim except such an equity as grows out of the guarantee of the lessee that the rent would amount to $450,000 a year.

Again, the petitioner makes a distinction between the indebtedness which accrued during the time that the rent was paid to the clerk of the United States court at the instance of the petitioner and the rent that accrued in 1878 before that order was made.

There is absolutely nothing in this claim. There is no trust obligation in regard to it. If it can be said that there was a trust obligation upon the part of the lessee to pay over to the petitioner the earnings of its road, that obligation was fully discharged when the lessee paid over to the petitioner the entire amount of net earnings made in the operation of its road. It certainly was discharged when the lessee paid over to the petitioner the entire 30 per cent. of gross earnings, it clearly appearing that the 30 per cent. of gross earnings was a much larger sum than the aggregate of net earnings.

So it is clear that there is not now and never has

been in the hands of the lessee any fund that could be called in any sense a trust fund.

Every dollar of income, every dollar of net earnings derived from the operation of the petitioner's railroad, has been turned over to the petitioner and nearly five hundred thousand dollars more, and as we have seen, more than eleven hundred thousand dollars has been paid over to the petitioner as rental over and above the entire net earnings of its property.

That being so, the sole indebtedness of the lessee to the petitioner is a simple contract indebtedness. The obligation is that of a contract, nothing more and nothing less, and it certainly rests upon no higher or better ground than an obligation to pay for money loaned or equipment purchased or any other ordinary obligation.

In view of these considerations it seems to us clear that the contention of the petitioner cannot be maintained.

Respectfully submitted,

STEVENSON BURKE,
Of Counsel for Respondents.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.

THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY, *Appellant*,

vs.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY, JOHN H. DEVEREUX, RECEIVER OF THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY, AND THE PENNSYLVANIA RAILROAD COMPANY.

No. 192.

Appeal from the Circuit Court of the United States for the District of Indiana.

REPLY BRIEF

IN BEHALF OF THE ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY.

BY

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BY JOHN M. BUTLER.

In reply to the briefs presented by Mr. John T. Dye and Mr. Stevenson Burke in behalf of respondents, the following suggestions are respectfully submitted in behalf of the appellant:

1. Counsel for respondents seem to have entirely lost sight of the fact that the original decree of the Circuit Court, of July 26, 1882, *has never been reversed as to the Indianapolis and St. Louis Railroad Company.* On the contrary, this Court held that "*That part of the decree which requires the Indianapolis and St. Louis Railroad Company to pay rent must stand.*"

Penn. Co. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S., 318.

That decree decreed the principal of rent then due to be $541,358.23, which principal sum due was then in open Court agreed to be correct by every party to that suit, including the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, chief respondent in this appeal. That decree further decreed the total amount then due, including principal and interest, to be $664,874.70. (See Appendix to my original brief in this appeal, pp. 3, 4.)

That decree stands affirmed as to the I. & St. L. R. R. Co. It undoubtedly became a lien upon all the property and franchises of the I. & St. L. R. R. Co., and remains a lien upon the proceeds arising from the sale of the property and franchises of the I. & St. L. R. R. Co., unless other claims against the I. & St. L. R. R. Co., large enough in aggregate amount to absorb the entire proceeds of sale, are held to be *prior in equity* to this decree in favor of the St. Louis, Alton and Terre Haute Railroad Company.

Only two claimants are seeking payment out of the proceeds of sale. The C., C., C. & I. Ry. Co., as owner of substantially all of the I. & St. L. R R. Co. second

and third mortgage bonds, demands that all the proceeds of sale now in Court shall be applied in payment upon said mortgage bonds.

The St. L., A. & T. H. R. R. Co. asks that the amount due it from the I. & St. L. R. R. Co. for the use of the railroad from Terre Haute to St. Louis, and its equipment, may be paid out of the proceeds of sale because it is a claim *prior in equity* to the second and third mortgage bonds.

It cannot be disputed that the I. & St. L. R. R. Co. owes the St. L., A. & T. H. R. R. Co. this $664,874.70.

The I. & St. L. R. R. Co. admits the indebtedness. The C., C., C. & I. Ry. Co., as bondholder, cannot deny this indebtedness for two reasons. *First.* Because the I. & St. L. admits the indebtedness. *Second.* Because the C., C., C. & I. Ry. Co. itself, in open Court, admitted the correctness of the amount found due by the decree of July 26, 1882.

As between the St. L., A. & T. H. R. R. Co. and the C., C., C. & I. Ry. Co., *as bondholder*, the question for decision is: Which claimant has the *prior equity*?

The St. L., A. & T. H. R. R. Co. claims priority in equity, because the debt due it from the I. & St. L. R. R. Co. is clearly an *operating expense* of the I. & St. L. R. R. Co.,—just as clearly as the rent of a freight car, the wages of a brakeman, or the cost of fuel and oil used in a locomotive are operating expenses,—and because the testimony proves conclusively that there were gross earnings abundant to have paid this debt, together with all other operating expenses, and because the testimony proves with equal conclusiveness that vast amounts

were diverted from gross earnings and applied to payment of bond interest, and for improvements, additions and new equipment.

The only ground on which the C., C., C. & I. Ry. Co. claims priority in equity is that it is the owner of the second and third mortgage bonds issued by the I. & St. L. R. R. Co.

To this claim of priority the St. L., A. & T. H. R. R. Co. interposes two answers:

First. That the law, as established by repeated decisions of this Court, is that operating expenses constitute a first and prior lien upon all gross earnings, and that if gross earnings have been diverted to the payment of bond interest, or to payment for improvements, new construction, new equipment, and added values to the mortgaged estate, leaving operating expenses unpaid, such diverted earnings must be restored, either from future net earnings, or, in default of net earnings, out of the proceeds of sale of the mortgaged property.

Second. That the peculiar relations existing between the C., C., C. & I. Ry. Co. and the I. & St. L. R. R. Co., and between both of said last named companies and the St. L., A. & T. H. R. R. Co., as shown by the testimony in the record of this appeal, and in the record of the former appeal, made part of the testimony in this appeal, very greatly strengthens the equity in behalf of the St. L., A. & T. H. R. R. Co. in its claim for *priority in payment* over the C., C., C. & I. Ry. Co., as bondholder.

These points were discussed in my original brief in this case. They are here alluded to for the purpose of

calling attention to the fact that counsel for respondents have studiously ignored the real points presented by this appeal, and have argued the case as though the decree of July 26, 1882, had been reversed as to the I. & St. L. R. R. Co.

2. Counsel for respondents claim that the intervening petition of the St. L., A. & T. H. R. R. Co. is not broad enough to support the claims and points presented in my original brief in behalf of the appellant.

Mr. Dye, in his brief, at page 2, says: "There is no claim in the intervening petition that there are any earnings or income of the receivership out of which this claim can be paid, but it is sought to subject to its payment the proceeds of the mortgaged property itself."

The St. L., A. & T. H. R. R. Co. did not need to aver or prove that there were earnings of the receivership out of which its claim could be paid. It only needed to aver and prove that there were abundant gross earnings out of which this debt, and all other operating expenses accrued prior to the receivership, might have been paid if the gross earnings had not been diverted to payment of interest and for improvements, additions and new equipment.

Fosdick v. *Schall*, 99 U. S., 252, 253, 254.

Miltenberger v. *Logansport Ry. Co.*, 106 U. S., 311.

Union Trust Co. v. *Illinois Midland Co.*, 117 U. S., 457.

Burnham v. *Bowen*, 111 U. S., 781, 782, 783.

These cases are quoted from in my original brief in this cause on pages 80–84.

The order of the Circuit Court in appointing a receiver for the I. & St. L. R. R. Co. is broad and comprehensive. It contains this provision:

"This Court expressly reserves to itself the right and power to make such orders and decrees touching the payment of the debts of the said Indianapolis and St. Louis Railroad Company *incurred in the management and operation of said railroad prior to the appointment of said receiver* as may be equitable and just." (Appendix to my original brief in this case, p. 11).

A few sentences quoted from the intervening petition will prove that it is broad enough to cover all the points urged.

"Petitioner further shows that under, and by virtue of the terms of said operating contract, it became, and was the duty of said Indianapolis and St. Louis Railroad Company to operate the said road of petitioner, and pay the rental reserved as aforesaid, and that such rental for the use and occupation of said continuous line constituted a part of the operating expenses of said Indianapolis and St. Louis Railroad Company; that said operating contract was executed before any of the bonds of said Indianapolis and St. Louis Railroad Company were issued and sold; that it was the duty of said Indianapolis and St. Louis Railroad Company to pay all its operating expenses, including the said rental of said petitioner's road, out of its earnings before it paid any interest upon its said bonds; that said Indianapolis and St. Louis Railroad Company, instead of paying its operating expenses, diverted and appropriated its earnings to improvements of its property, in better equip-

ment and new construction, and the payment of interest upon its bonds, and neglected and refused to pay petitioner's rental. * * * Petitioner further states, upon information and belief, that during the time said defendant, The Indianapolis and St. Louis Railroad Company, has been in the possession of petitioner's road as aforesaid, the amount of such misappropriation and diversion of the funds that should have been applied to the payment of operating expenses amounts to a large sum, to-wit, the sum of one million dollars. * * * Your petitioner, therefore, prays that as to said sum of $664,874.70, it may be decreed to have a prior claim upon the fund arising from the sale of said Indianapolis and St. Louis Railroad to that of the bondholder, and that upon a distribution of said fund, its said rental be paid prior to any payments to the bondholders of said Indianapolis and St. Louis Railroad Company." (Record pp. 3, 4, 8.)

3. Both of the counsel for respondents seem to regard this intervening petition as an attempt by the St. L., A. & T. H. R. R. Co. to hold the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. liable for the amount due from the I. & St. L. R. R. Co. to the St. L., A. & T. H. R. R. Co. for the use of its railroad and equipment as *guarantors of the lease executed by the I. & St. L. R. R. Co.* Much space is given,—particularly by Mr. Burke,—to an argument in refutation of the liability of these companies *as guarantors.*

This probably arises from the fact that it is much easier for respondents counsel to answer an argument of their own manufacture, and assail a position of their

own choosing, than to answer the points actually presented by this appeal.

No suggestion of any claim of liability of these companies *as guarantors of the lease*, can be found in my original brief in this case. No suggestion or claim of liability of the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. for this debt due appellant, either as guarantors of the lease, or on any other ground, can be found in my brief. No point decided by this Court on the former appeal is presented for decision, or review, by this appeal. There is no point of similarity between this appeal and the former appeal, excepting the fact that both appeals grow out of the use and possession by the I. & St. L. R. R. Co. of the railroad and equipment of the St. L., A. & T. H. R. R. Co.

The former appeal involved the validity of the lease and guaranty contract *as between the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., on the one hand, and the St. L., A. & T. H. R. R. Co., on the other hand.* The I. & St. L. R. R. Co. WAS NOT A PARTY TO THAT APPEAL. It submitted to the decree of the Circuit Court without appeal. As to it this Court decided that the decree of the Circuit Court of July 26, 1882, "MUST STAND."

By this appeal the St. L., A. & T. H. R. R. Co. seeks to hold the property of the I. & St. L. R. R. Co. *and the proceeds of sale of that property*, liable for the debt due for the use of its railroad and equipment by the I. & St. L. R. R. Co. as part of its railroad line.

The general facts out of which both appeals grow are the same. It, therefore, became proper and necessary in giving a true statement of facts in this appeal to re-

state the general facts and history of the transactions giving rise to the contest presented by this appeal.

No attempt is here made,—none can be found in my brief in this case,—to hold the C., C., C. & I. Ry. Co. liable for this debt, or any part of it, either as guarantor or otherwise. The Penn. R. R. Co. has no interest whatever in this appeal and need not be considered in connection with it.

The St. L., A. & T. H. R. R. Co. is here asking payment of its debt out of the proceeds of sale of the property and franchises of the I. & St. L. R. R. Co. *in preference to payment of the mortgage bonds held by the C., C., C. & I. Ry. Co., and that is the reason the C., C., C. & I. Ry. Co. is contesting this appeal.*

It is not here contesting against being held liable for this debt *as a guarantor of the lease which this Court has held void.* No such question is presented by this appeal, but it is here *as a bondholder*,—owning substantially all of the second and third mortgage bonds issued by the I. & St. L. R. R. Co., and is now asking this Court to apply the entire proceeds of sale upon the payment of its bonds and cut off the St. L., A. & T. H. R. R. Co. from the possibility of ever securing payment of its debt or any part thereof.

In my original brief in this case, in discussing the rights of the C., C., C. & I. Ry. Co., *as bondholder*, I have argued that even if the C., C., C. & I. Ry. Co. had been a stranger to all the transactions embodied in the history of this entire litigation,—even if it had never had any other connection with these transactions than simply to buy in the open market the bonds it now holds,—still,

under the law and the established principles of equity governing such cases, the debt of the St. L., A. & T. H. R. R. Co. ought in equity and good conscience to be paid out of the proceeds of sale now in Court *in preference to, and as prior in equity to, the mortgage bonds.*

In addition to the presentation of the facts that there were ample gross earnings to have paid all this rent, together with all other operating expenses; that the debt due the St. L., A. & T. H. R. R. Co. is an *operating-expense debt* of the I. & St. L. R. R. Co.; and that large amounts of gross earnings,—far more than enough to pay this debt,—were diverted and paid out *for the benefit of the bondholders* in payment of bond interest and for improvements, new construction and new equipment, I have also called attention to the peculiar connection and relation existing between the C., C., C. & I. Ry. Co. and the I. & St. L. R. R. Co. as furnishing an additional reason why, as between the C., C., C. & I. Ry. Co., *as bondholder*, and the St. L., A. & T. H. R. R. Co., as claimant for unpaid rent due from the I. & St. L. R. R. Co., *preference in payment ought in equity to be given to the St. L., A. & T. H. R. R. Co.* No court of equity can know the history of the I. & St. L. R. R. Co. and the connection of the C., C., C. & I. Ry. Co. with that history, as a chief actor, and then hold that the C., C., C. & I. R. Ry. Co. stands before this Court simply as a bondholder and in all other regards a stranger to the I. & St. L. R. R. Co. The fact that it was largely instrumental in inducing the St. L., A. & T. H. R. R. Co. to enter into the lease of September 11, 1867; the fact that it was one of the chief creators of the I. & St. L. R. R. Co., took its stock and its

bonds and attempted to guarantee its performance of its contract with the St. L., A. & T. H. R. R. Co.; the fact that the I. & St. L. R. R. Co. was created for the express purpose of aiding the C., C., C. & I. Ry. Co. in the accomplishment of its desires by becoming lessee of the railroad and equipment of the St. L., A. & T. H. R. R. Co.; the fact that the St. L., A. & T. H. R. R. Co. entered into that contract and permitted the I. & St. L. R. R. Co. to use and possess its railroad and franchises *at the request of the C., C., C. & I. Ry. Co.*, and, in good faith, relying upon its promises; and the fact that the C., C., C. & I. Ry. Co. reaped the benefit of the use of appellant's railroad far more than any other corporation connected with the transaction, in that, by means of the use of said railroad to St. Louis it obtained business from which it made the largest part of its gross earnings—all these facts, and many others that might be mentioned, render it impossible for a court of equity to look upon the C., C., C. & I. Ry. Co. in its contest for preference in payment simply as an ordinary bondholder. If it were only an ordinary bondholder the St. L., A. & T. H. R. R. Co. is clearly entitled in equity to preference in payment, but these other facts,—that ought not to be ignored,—greatly intensify and strengthen the equity in behalf of the St. L., A. & T. H. R. R. Co. to preference in payment.

In this connection it is proper to refute the statement made by Mr. Dye on page 3 of his brief, "that the appellant was anxious to make the contract of lease set forth in the intervening petition." To substantiate this assertion he cites the letter of Charles Butler, Pres-

ident of the St. L., A. & T. H. R. R. Co., to J. Edgar Thompson, President of the Penn. R. R. Co., dated August 12, 1867. It will be remembered that the original lease and first guaranty contract were executed and delivered May 17, 1867. In that lease the syndicate companies made the T. H. & I. R. R. Co. the lessee. That company declined to become the lessee, and the Penn. R. R. Co. withdrew from the syndicate and joined with the T. H. & I. R. R. Co. in building the Vandalia Line from Terre Haute to St. Louis. The Penn. R. R. Co. never was connected with the creation of the I. & St. L. R. R. Co. nor with the substituted lease and guaranty contract of September 11, 1867, until long afterwards, when it became the lessee of the P., Ft. W. & C. Ry., and assumed that company's place in the syndicate.

The letter of Mr. Butler, referred to, was written touching the declination of the Penn. R. R. Co. to remain a party in the substituted lease arrangement. Instead of supporting the statement of Mr. Dye, it flatly contradicts that statement. To save the Court the trouble of referring to the record of the former appeal, I here quote a part of the letter—it is too long to quote in full.

"*First.* The refusal of the Indianapolis and Terre Haute Railroad Company to execute the contract with the St. Louis, Alton and Terre Haute Railroad Company, or, in the milder language of the guaranty, 'its failure to do so,' is the precise contingency expressly provided by the written contract of guaranty which was deliberately given to the St. Louis, Alton and Terre Haute Railroad Company, signed, with others, 'The

Pennsylvania Railroad Company, by J. Edgar Thompson, President.' The guaranty so signed was in its terms absolute, subject only to the condition that in the contingency of another corporation owning, and completing a railroad from Indianapolis to some point on the road of the party of the fifth part,—The St. Louis, Alton and Terre Haute Railroad Company,—easterly of Terre Haute, should be accepted in lieu of the said Terre Haute and Indianapolis Railroad Company.

"No ingenuity can profess to believe or even maintain that any event has happened which was not contemplated by the parties, and expressly provided for in the written agreement, to account for any change of purpose on the part of the Pennsylvania Railroad Company.

"*Second.* I notice that in the written offer made by the associated companies under date of April 11, 1867, to this company, which was the basis of the contract subsequently perfected, and which offer was made in behalf of the Pennsylvania Railroad Company as well as the others, no reference was made to any contingency relating to the Indianapolis and Terre Haute Railroad Company. The offer is absolute in its terms with reference to that company. That offer so made was formally accepted." (Record of former appeal, pp. 171, 172.)

In addition to this letter, a glance at the substituted lease and guaranty contract, as set forth in the record of this appeal, will demonstrate the fact that there is no foundation at all for the assertion made by Mr. Dye. On the contrary, all the *offers and requests* came from the associated companies,—the corporations now forming

the C., C., C. & I. Ry. Co., being the chief actors in the matter of the substituted lease and its procurement. For proof of the correctness of the above statements, I only need cite the record in this appeal. (Record pp. 11, 12, 21, 22, 25, 26.)

4. Objection is made that the intervening petition of the St. L., A. & T. H. R. R. Co. does not rest upon any implied contract to pay a *quantum meruit* for the use of appellant's road, but rests upon an express contract, namely, the lease of September 11, 1867; also that the petition "sets up an alleged guaranty of that express contract by these appellees and others, which it is careful to recite, has been adjudged valid and binding, and upon which judgments have been rendered against these appellees."

It is true that the intervening petition sets out the facts just as they stood when it was filed. To do this it of necessity set forth the fact that the Circuit Court had held the lease valid, and the guaranty contract binding, and had entered decrees against the guarantor companies accordingly. But it is not true that the intervening petition seeks or demands any judgment or decree against the guarantor companies or either of them. On the contrary, by the intervening petition, the St. L., A. & T. H. R. R. Co. asks the Court for payment of its debt out of the proceeds of sale of the railroad, and franchises of the I. & St. L. R. R. Co., *regardless of the guaranty contract*, and as though no decree had been entered holding the guarantor companies liable on their written guaranty. By its intervening petition it simply asks payment of its debt out of proceeds of sale *in preference to payment to bondholders.*

No one acquainted with this litigation, and the rulings of Judge Drummond entered in the cause while in the Circuit Court can fail to believe that the prayer of this intervening petition would have been instantly granted but for the fact that the Court had already entered the decree of July 26, 1882. The language of the decree refusing this petition, prepared by the Judge himself, most clearly establishes this fact. (Record p. 92.)

As between the St. L. A. & T. H.R. R. Co., as creditor, and the I. & St. L. R. R. Co., as debtor, the question of *quantum meruit* does not necessarily arise, because the decree of July 26, 1882, stands affirmed, and remains in full force as against the I. & St. L. R. R. Co.

But while this is true, it was deemed proper to show this Court by facts in the record, and arguments drawn therefrom, that the amount found and decreed due to the St. L., A. & T. H. R. R. Co. *under the contract* and in accordance with the terms of the lease *is no more than a fair and just compensation, and is what would have been decreed upon quantum meruit if no contract fixing measure of compensation had ever been agreed upon.*

The points and arguments of my original brief upon the subject of *quantum meruit* were submitted for the purpose of demonstrating the fact that this Court in holding the St. L., A. & T. H. R. R. Co. to be entitled to priority and preference in payment out of the proceeds of sale of the amount decreed due by the Circuit Court, would be doing no wrong to the C., C., C. & I. Ry. Co., as bondholder, because the amount decreed due is no more than just compensation upon a *quantum meruit* would be.

Indirectly, and with apparent care and hesitation, counsel for respondent seeks to be understood as arguing that $37,500 per month, or $450,000 per year, is too much for the use of appellant's railroad and franchises, but they do not squarely and openly claim that that amount is too much. They could not do that, because this record shows that while they were contending against the former lease as *ultra vires* and void, and while the former appeal was pending in this Court, this same bondholder, the C., C., C. & I. Ry. Co., together with the reorganized I. & St. L. Ry. Co., entered into a new contract of lease with the St. L., A. & T. H. R. R. Co. for ninety-nine years, of the same railroad and franchises covered by the old lease, *and agreed to pay as minimum reserved rent precisely the same rent stipulated in the old lease*, to wit: $37,500 per month, payable monthly, equalling $450,000 per year, and, in addition, agreed to expend large sums of money in improving the road and equipment of the leased line. (Record pp. 55–62.)

Counsel for respondents are exceedingly careful not to mention the existence of this new lease. It is abiding testimony that the C., C., C. & I. Ry. Co. well knows that the amount of rent decreed due to appellant is no more than a just and equitable compensation for the use of its property. This new lease is also quite illustrative of the perfect good faith of the C., C., C. & I. Ry. Co. in its contention against the old lease as *ultra vires* and void.

5. The computations and statements of results set forth by counsel for respondents in their briefs, are all

based upon a comparison between rent and other operating expenses, and what they call *net earnings*. This fact renders all their computations and the results deduced therefrom falacious and misleading.

They have failed to regard the well settled principle of law, *that there are no net earnings until all operating expenses and managing expenses are paid in full.*

Fosdick v. *Schall*, 99 U. S., 252.

Union Pacific R. R. Co. v. *United States*, 99 U. S., 420–423.

The fact that the $26,568,252.31 of gross earnings as shown by their own evidence (Exhibit S., Record p. 78), was ample, and far more than enough, to pay all operating and managing expenses, *including all rent due to the St. L. A. & T. H. R. R. Co.*, is not disputed. It cannot be denied.

The fact that vast sums of money were taken from these gross earnings and applied to payment of bond interest and for improvements, new construction and new equipment, leaving rent for the use of the track, on which more than two-thirds of all the gross earnings were made, unpaid, is not disputed. It can not be denied.

In their briefs in this appeal counsel for respondents have but little to say about the moneys advanced to the I. & St. L. R. R. Co. by the C., C., C. & I. Ry. Co. and the Penn. R. R. Co. On the former appeal they had much to say about these ADVANCES. In fact, they constituted the burden of their arguments. This Court was led to believe that the *leased line*, had been a *dead weight*, and had been gratuitously carried for the I. & St. L. R.

R. Co. by these advances made by the guarantor companies. The evidence in the record of this appeal conclusively proves the absolute emptiness of all these assertions. Instead of being a dead weight, the record shows that between two-thirds and three-fourths of all earnings received were earned upon the track of the leased line. The earnings per mile on the leased line were fully equal to the earnings per mile on the line from Indianapolis to Terre Haute, while the operating expenses per mile per year on the leased line were far less than the operting expenses per mile per year on the line from Indianapolis to Terre Haute. The exact computations and citations of the record to support these statements are given in my original brief in this cause, and need not be here repeated.

The record proves that the bondholders of the I. & St. L. R. R. Co. have received in cash paid on interest $2,245,981.62. (Record, pp. 52 and 54.) They have received in cash paid into mortgage-bond sinking fund $47,809.74. (Record, p. 53.) Upon the face of the evidence (Record, p. 53, Exhibit "E"), the bondholders have received in new construction, new equipment and added values to the mortgaged estate since the completion of the I. & St. L. R. R., July 1, 1870, the further sum of $1,716,988.69, but it is claimed by the witness, Hewitt, that the last item of this exhibit should be counted as original construction, and should be deducted from expenditures for new construction and equipment. I do not think he is correct in this claim, but, giving the bondholders the benefit of the doubt, I subtract the $233,576.92 from the $1,716,988.69, which leaves an un-

disputed amount received by the bondholders in new construction, new equipment and improvements to their mortgaged estate of $1,483,411.77. These three items foot up $3,777,203.13, which the bondholders of the I. & St. L. R. R. Co. have received in cash and its equivalent.

The total *advances* by the guarantor companies,—they being at the same time chief stockholders and chief bondholders of the I. & St. L. R. R. Co.,—is $1,582,170.24. (Record, p. 46). Subtracting the total of advances from the total received by bondholders in interest and new construction and equipment, *leaves a net cash benefit received by the bondholders, over and above all the advances of the C., C., C., & I. Ry. Co. and the Penn. R. R. Co., of $2,195,032.89.*

These are undisputed facts. They prove beyond all cavil that no advances were ever made, or were ever needed, in order to enable the I. & St. L. R. R. Co. to pay its operating expenses, including the rent for the leased line, if the gross earnings had been properly applied. The advances were in fact made by the bondholders and owners of the I. & St. L. R. R. Co. *to enable their company to pay its bond interest and construct additions and improvements to its property.* The improvements and additions to the property of the I. & St. L. R. R. Co. are only $98,758.47 less than the entire amount of the advances.

After crediting all the advances to improvements and interest as above, we find that the bondholders of the I. & St. L. R. R. Co. have received in cash interest,—over and above all advances,—the sum of $2,195,032.89.

EVERY DOLLAR OF THIS $2,195,032.89 WAS PAID OUT OF GROSS EARNINGS APPLICABLE ONLY TO OPERATING EXPENSES, INCLUDING THE RENT DUE APPELLANT, UNTIL ALL OPERATING AND MANAGING EXPENSES WERE FULLY PAID.

Can a court of equity ignore this fact? Every dollar now due the St. L., A. & T. H. R. R. Co. ought in law and equity to have been paid out of these millions of dollars of gross earnings diverted to the benefit of the bondholders,—the C., C., C. & I. Ry. Co. being chief bondholder.

The bondholders having received this money out of which appellant's debt ought to have been paid, appellant now asks this Court to pay its debt out of the proceeds of sale *in preference to making still further payment to the bondholders.* Is not this right? Is not the prayer of its intervening petition just and equitable? If not, the repeated decisions of this Court on this subject are all wrong.

Mr. Dye claims that only transactions from 1878 forward can be examined, because appellant's claim began to accrue in 1878. This, in my opinion, is a mistaken notion. Suppose the I. & St. L. R. R. Co. had been for years prior to 1878, diverting its gross earnings to payment of interest and for new construction and equipment, gradually running behind in payment of operating expenses and debts that ought to have been paid out of the diverted earnings, and then in 1878, it ceased paying current operating expenses and applied its gross earnings to the payment of operating expenses and other debts that ought to have been paid out of diverted earnings, would it not be just, lawful and equita-

ble to look into the accounts and doings back of 1878? This is just what did take place, as shown by the evidence.

There is another all-sufficient reason why the Court ought not in this case to limit its consideration to the period from 1878 forward, but that the entire period of the use of appellant's railroad under the alleged lease ought to be considered as a whole. It is this: It is perfectly apparent that the I. & St. L. R. R. Co. and its owners and managers,—when they determined to quit paying rent,—deliberately formed a plan *to absorb all, or as nearly all as possible, of the gross earnings in re-building and improving the I. & St. L. R. R. from Indianapolis to Terre Haute.* They did this under the guise of operating expenses. A glance at the evidence makes this fact apparent. For example, the charge of operating expenses for the year 1880 is nearly $400,000 more than for the year 1878. The charge for operating expenses for 1881 is $800,000 more than for the year 1877, while in less than five months of 1882, viz: from January 1 to May 23, the charge to operating expenses is $952,126.90, which is only $112,543 less than the operating expenses of the entire year 1877. There is no evading the meaning of these figures. They prove conclusively that the I. & St. L. R. R. Co., and its owners and managers, deliberately purposed, not only not to pay the rent due the leased line, but also to absorb all the earnings in rebuilding their road preparatory to a foreclosure sale. The witness Hewitt clearly disclosed this plan when he testified that *"large improvements were being made to the property during these months,"*—referring to the years

1881–82. (Record p. 82.) This entire subject was considered and careful computations were set forth in my original brief in this cause and need not be here further considered. Notwithstanding the grossly exorbitant charges to operating expenses,—which really cover improvements and additions to the I. & St. L. R. R.,—still an examination of the evidence shows that the gross earnings of each year, taken separately and single, *were sufficient to pay all operating expenses, including the rent for the leased line as an operating expense*, excepting only the years 1878, 1881 and five months of 1882.

Mr. Burke admits the propriety of considering the entire period of use under the alleged lease. At all events, his computations are based upon a consideration of the earnings and expenses of the entire period. The falacy in his computations is that he institutes comparisons based upon what he is pleased to call *net earnings*, while the evidence shows that what he calls net earnings *were not net earnings*, but were simply the residue of *gross earnings*, left after paying *part* of the current operating expenses.

It was on the former appeal industriously urged that *no benefits* have ever accrued to the I. & St. L. R. R. Co., or to any of the guarantor companies from the use of the leased line. That question did not fairly arise on that appeal. The benefit of a through continuous line reaching St. Louis is too apparent to need argument. That the use of its leased line was of vast pecuniary advantage, not only to the I. & St. L. R. R. Co., but also to its chief bondholder, the C., C., C. & I. Ry. Co., is self-evident. When counsel for respondents insist that

the C., C., C. & I. Ry. Co. obtained nothing of value by reason of this lease, they heavily tax our credulity as to their sincerity. The C., C., C. & I. Ry. from Indianapolis to Cleveland could not have earned its ordinary operating expenses a single month without its line to St. Louis made up of its I. & St. L. R. R. and the leased line.

Mr. Burke in his brief, at page 14, admits the benefit derived by the I. & St. L. R. R. Co. from its connection with the leased line. It is equally evident that the benefit derived by the chief bondholder, the C., C., C. & I. Ry. Co., was co-extensive with the benefit derived by the I. & St. L. R. R. Co., or nearly so.

On the same page of his brief Mr. Burke sees fit to say: "The counsel of the petitioner have argued at great length, and we must say that they have not been over scrupulous in their use of facts to show the great benefit derived by the Cleveland, Columbus Cincinnati and Indianapolis and Pennsylvania Railway Companies growing out of the use by the Indianapolis and St. Louis Railway Company of the lease-hold property." In reply to this insinuation, permit me to say that it would probably have been fully as proper and courteous for counsel for respondents to have pointed out some error in statement of facts and proved such error by reference to the record rather than deal in such an unwarranted insinuation. Every statement of fact set forth in my brief is proved by the record and citations of the exact part of the record in support of such statement of fact is given.

On page 4 of his brief Mr. Burke says: "Another ground upon which it is sought to recover a certain

amount of back rental, is that part of the rent claimed accrued within six months preceding the appointment of the Receiver, and that all debts contracted within six months preceding the appointment of the Receiver are entitled to priority over the mortgage." No such statement can be found in my brief. Exactly the contrary is insisted on in my brief, as will be found by reference to page 79.

In my original brief in this cause, on pages 50 and 55, I showed from the evidence in the record that the I. & St. L. R. R. Co. pocketed in net cash profit derived from the lease $290,683.88 *before the I. & St. L. R. R. Co. had completed its road*, and that afterwards it collected and *pocketed of* POOL EARNINGS,—every dollar of which it received because it held possession of the leased line under the lease,—the further sum of $322,396.77, *not a dollar of which was ever credited to the earnings of the leased line, although it was all received by reason of the lease.*

These two items make $613,080.65 *net cash profit* received, and retained by the I. & St. L. R. R. Co. because of its possession of the leased line. This is almost enough to pay appellant's claim. This large sum of money was all clear profit without labor or expense. The bondholders of the I. & St. L. R. R. Co. got this benefit, did they not?

Mr. Dye in his brief, at page 17, says: "Mr. Butler complains that the pool earnings were not credited to appellant, but the witness, Mr. Hewitt, distinctly swears they were credited to appellant in Exhibit S made by him." That is true. Mr. Hewitt does swear that the

pool earnings are included in his Exhibit "S." He was perfectly safe in so swearing. Exhibit "S" includes ALL the receipts of BOTH the I. & St. L. R. R. and the leased line. Hence it does of necessity include the pool earnings, *but it does not include these pool earnings as credits to the earnings of the leased line.* The heading of Exhibit "S" is as follows: "*Statement of earnings, expenses, rental and interest on bonds of the Indianapolis & St. Louis R. R. Co.*, BOTH DIVISIONS." Hence Hewitt was safe in swearing that the pool earnings are included in Exhibit "S," but it by no means follows that any part of the $322,396.77 was ever credited to the leased line as earnings of the leased line. Mr. Hewitt further swears that these pool earnings are included in Exhibit "T." That statement is obviously incorrect. The pool earnings could not be included in Exhibit "T," because all of the net pool earnings accrued before the date at which Exhibit "T" begins. (See record of former appeals, pp. 217, 218.)

Hewitt was careful not to swear that any part of the pool earnings are included in Exhibit "Q." (Record p. 76). That is the exhibit in which they would appear if they had ever been credited to the leased line as they should have been. Exhibit "Q" is headed, "Statement of earnings, expenses, rental, etc., of the St. L., A. & T. H. R. R. for the years 1867 to 1882." Hewitt carefully avoided testifying that any pool earnings are included in Exhibit "Q." That is the exhibit in which they must appear if credited to the earnings of the leased line.

Mr. Elliott swears that he was Auditor of the I. &

St. L. R. R. Co., and kept the books. He swears that no part of the pool earnings were ever credited to the leased line. I have quoted his exact words as given in testimony in my original brief in this cause on page 55.

Mr. Nash swears that he made up his exhibits, found in this record, from the books kept by Mr. Elliott, in which Elliott swears all pool earnings were credited to the I. & St. L. R. R. Co., and none to the leased line. Mr. Nash's Exhibit "K" of earnings and operating expenses of the leased line (Record p. 65) does *not* contain any pool earnings, and it is precisely the same, as to earnings, as Hewitt's Exhibit "Q" (Record p. 76). Mr. Nash's Exhibit "A" (Record p. 50) does contain all of the pool earnings as credits to the I. & St. L. R. R. Co. from Indianapolis to Terre Haute. Adding Mr. Nash's Exhibit "A" to Mr. Hewitt's Exhibit "Q," as to earnings, makes precisely the same amount of gross earnings as given in Mr. Hewitt's Exhibit "S," thus proving conclusively from the record that not a dollar of pool earnings has ever been credited to the lease line.

Mr. Dye seeks to found an argument in behalf of the C., C., C. & I. Ry. Co., as bondholder, on the ground that no interest had been paid on the second and third mortgage bonds since the close of the year 1877. There is nothing whatever in this argument. The record shows that $490,105 has been paid on bond interest since the first day of January, 1878. (Record p. 52.) Everybody knows that every dollar of interest paid on the first mortgage bonds *inured directly to the benefit of the holders of the second and third mortgage bonds* in protecting the

property from foreclosure and sale on the first mortgage, which would of necessity have destroyed the value of the second and third mortgages. No argument is necessary to illustrate this self-evident fact.

6. The entire legal argument of Mr. Dye is addressed to a case not before this Court on this appeal. The two chief propositions are:

First. That the I. & St. L. R. R. Co. is not liable for this rent, because the lease is void.

Second. That the guarantor companies can not be held liable for this debt due the St. L., A. & T. H. R. R. Co., because the guaranty contract is *ultra vires* and illegal.

Neither of these propositions is before this Court for consideration or decision. In making and arguing them, counsel has again lost sight of the case before the Court. *The liability of the I. & St. L. R. R. Co. to pay this rent is already fixed. This Court has so decided.* Appellant is not here attempting to obtain a recovery against, or fix a liability upon, the I. & St. L. R. R. Co. That question is already settled. Appellant is seeking payment out of the proceeds of sale of the railroad and franchises of the I. & St. L. R. R. Co. of a decree against the I. & St. L. R. R. Co., for unpaid rent.

Appellant is not seeking to fix any liability upon the guaranteeing companies, nor is it asking any recovery against any corporation as guarantor of the lease.

Appellant asks preference in payment over the bondholders; nothing more. The fact that one of the guarantor companies is the owner of most of the mortgage

bonds does not lessen appellant's right in equity to preference in payment. On the contrary, we claim that that fact greatly strengthens appellant's equitable right to priority and preference in payment.

Another proposition advanced by Mr. Dye is certainly unique. It is in effect that the St. L., A. & T. H. R. R. Co would stand on a much better footing before this Court if it had *committed a fraud* than it does now. The argument is that Courts of equity will grant recovery, and enforce payment, upon *quantum meruit* in cases where contracts are held void for *gross fraud*, but will not grant relief as upon *quantum meruit* in cases where there is no fraud, where one of the parties is fully authorized to make the contract, but where the other of the contracting parties has innocently, and in good faith entered into a contract in the general line of its business, and in furtherance of its interests, but which contract is held by the Court to be unauthorized by its charter. The statement of the proposition is its own refutation. It is abhorent to equity and good conscience. Apply this proposition for a moment to this case. This Court has held that the St. L., A. & T. H. R. R. Co. was fully authorized by its charter, and the laws of Illinois to enter into the contract of lease. It has done no wrong therefore. It has committed no fraud. The I. & St. L. R. R. Co. entered into this contract we are bound to suppose innocently, and in good faith. There is no ground for doubt on this point. The contract is in the general line of railroad business. It is not *malum in se*. It is not void as against public policy on the ground that it is in itself a vicious contract, because this

Court expressly held that if the laws of Indiana had given to the I. & St. L. R. R. Co. the same power that the laws of Illinois gave to the St. L., A. & T. H. R. R. Co., this contract would have been perfectly valid and binding. The contract was held void simply, and solely on the ground that the I. & St. L. R. R. Co. lacked the power to enter into such a contract. It did enter into the contract, and did possess, and use the appellant's railroad and franchises, and reaped vast profit in money and business from such possession and use. This fact can not be disputed. The record proves it. To claim that a Court of equity ought to hold that the St. L., A. & T. H. R. R. Co., under such circumstances, does not stand on as good a footing as it would if it had committed a *gross fraud*, is too absurd for serious consideration. The case of *Davis* v. *Old Colony R. R.*, cited by Mr. Dye in support of his position, has no such ruling in it. On the contrary, it does contain exactly the opposite ruling. It says: "A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received."

By the decree of July 26, 1882, the Court found that the I. & St. L. R. R. Co. collected and applied to its own use the entire gross earnings of the leased line from April 1, 1878, to October 26, 1878, *and has never paid a penny for the use of the leased line for that seven months.* The Court further found that 30 per cent. of the gross earnings earned on the leased line during that seven months is $164,052.82. (See Appendix to my original brief in this case, p. 4). How can a court of equity re-

fuse to restore and pay this sum, with its interest, out of the proceeds of sale? We claim that this 30 per cent. is trust money wrongfully withheld by the I. & St. L. R. R. Co.; that it never was the money of the I. & St. L. R. R. Co., but was, as it was earned and collected, the money of the St. L., A. & T. H. R. R. Co., reserved to it, and received in trust by the I. & St. L. R. R. Co. Mr. Dye claims that it is not a trust fund; that it is not a reservation of rent; that the agreement as to rent is a positive agreement to pay $37,500 monthly, and a sum equal to 30 per cent. of the gross earnings when ascertained. (Mr. Dye's brief, p. 12.) Mr. Burke takes precisely the opposite view and argues that 30 per cent. of the gross earnings is the real rent reserved, and that the I. & St. L. R. R. Co. is simply a *guarantor* that the 30 per cent. shall equal $37,500 per month.

In either case it seems utterly impossible for a Court of equity to hold that the I. & St. L. R. R. Co. may keep this money and never pay a dollar for the use of the leased line for a period of seven months. No one can ever conscientiously believe that that would be right.

7. The argument of Mr. Burke may be stated in three propositions.

First. That 30 per cent. of the gross earnings earned on the leased line is the real rent reserved in the lease; that the provision requiring the I. & St. L. R. R. Co. to pay $37,500 per month is *only a contract of guaranty* by which the I. & St. L. R. R. Co. guaranteed that 30 per cent. of the gross earnings should amount to $450,000 per year.

Second. That all of the decree in favor of the St.

L., A. & T. H. R. R. Co.,—*excepting $164,052.82, that sum being 30 per cent. of the gross earnings of the leased line from April 1, 1878, to October 26, 1878,*—is based on the *guaranty part of the lease*, and cannot, therefore, be said to be based upon a valuable consideration received by the I. & St. L. R. R. Co., and that for this reason all of the amount fixed by the decree,—excepting the said $164,052.82,—can only be regarded as an ordinary floating debt—merely a contract obligation.

Third. From these propositions he deduces a third, viz: That all of this decree that rests upon the supposed guaranty contract embodied in the lease,—*which means all of the decree excepting the $164,052.82*,—cannot be classed as operating expenses, and is not, therefore, entitled to preference in payment over the mortgage bonds.

The lease does not support Mr. Burke's propositions. The provision requiring payment of $37,500 monthly is an absolute agreement, regardless of whether the 30 per cent. of gross earnings reserved does or does not amount to $37,500 per month. It is not a guaranty. The language is as follows:

"It is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and it is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without leaving or creating any claim or charge upon the earnings of any future year.

"The manner and times of payment hereinbefore provided shall be as follows: On the first day of July,

one thousand eight hundred and sixty-seven, and of every month in each year thereafter, shall be paid thirty-seven thousand and five hundred dollars for the month, being one equal twelfth part of the minimum payment herein provided to be made for each, any and every year of the term aforesaid." (Record, p. 16.)

This is the provision upon which the decree against the I. & St. L. R. R. Co. in favor of appellant is based,—*excepting as to $164,052.82, the 30 per cent. of gross earnings from April 1, 1878, to October 26, 1878, withheld and appropriated by the I. & St. L. R. R. Co.*

The decree stands affirmed as against the I. & St. L. R. R. Co. The liability to pay this rent is fixed. We have shown that there is a valuable consideration supporting this decree. The I. & St. L. R. R. Co. received in cash from net earnings of the leased line earned before the I. & St. L. R. R. Co. was completed, and from pool earnings received by reason of its possession of the leased line, $613,030.65. More than two-thirds,—almost three-fourths,—of all the earnings ever received by the I. & St. L. R. R. Co. were earned on the track of the leased line. Possession of the leased line enabled the I. & St. L. R. R. Co. to do substantially all the business it ever did do. Without the leased line the I. & St. L. R. R. Co. could not have kept its road a "going concern" a single month.

The amount fixed by the decree is no more than just and equitable. If this were not true, the reorganized I. & St. L. Ry. Co., and the C., C., C. & I. Ry. Co. would not have entered into the new lease which contains precisely the same provision as above quoted.

(Record p. 59.) The entire line from Indianapolis to St. Louis was operated by the I. & St. L. R. R. Co. as a unit,—a single continuous line,—from the day the I. & St. L. R. R. was completed. It is proved that the gross earnings of the entire line were far more than sufficient to pay all operating expenses, including the rent of the leased line. It is proved that millions of dollars from gross earnings of the entire line went to pay interest on I. & St. L. R. R. Co. mortgage bonds, and to pay for improvements, new equipment, and added values to the property of the I. & St. L. R. R. Co.

If all these facts do not bring this case directly under the repeated decisions of this Court holding such claims entitled to payment out of proceeds of sale in preference to mortgage bonds, it would seem impossible to describe a case that would fall under the decisions.

Mr. Burke says in his brief (p. 32): "The money not earned upon the road of the petitioner, as we have seen, was supplied by the stockholders of the lessee." By this sentence Mr. Burke intends to say that the C., C., C. & I. Ry. Co. and the Penn. R. R. Co., as owners of the capital stock of the I. & St. L. R. R. Co., made advances to enable the I. & St. L. R. R. Co. to pay rent that has been paid. It has been demonstrated from the record, both in my original brief and in this reply brief, that there is no foundation in fact for such an assertion. The facts, as proved by the record, are that all advances made by these respondents were only about sufficient to pay for the improvements, new construction and new equipment added *to their property,—the I. & St. L. R. R.*,—while over $2,200,000 of cash was paid to the

bondholders in interest directly out of the gross earnings of the line from Indianapolis to St. Louis. If the gross earnings had been lawfully and rightfully appropriated to the payment of operating expenses instead of being diverted to the payment of interest and for new construction and equipment, these respondents never could have been called upon for a penny. The gross earnings would have paid all operating expenses, including all rental, and have left besides a large amount for application upon bond interest. In the face of these facts so clearly proved by the record, it is strange that such a statement as the above is made.

But Mr. Burke claims that appellant's claim for rent is not an operating expense of the I. & St. L. R. R. Co., and is not, therefore, entitled to preference in payment out of proceeds of sale. If it had only been rent of a few miles of track to enable the I. & St. L. R. R. Co. to get its cars into the City of Terre Haute, Mr. Burke would find no difficulty in calling the rent current operating expenses. Does the length of the leased line change the principle? If a railroad company owning a line from Indianapolis to Terre Haute rents White Line cars or stock cars to run between St. Louis and Indianapolis would not the rent of such cars be an operating expense of the company renting the cars? What difference in principle is there between renting a car to run between Terre Haute and St. Louis and renting a railroad track between Terre Haute and St. Louis upon which to operate the cars? Every attempt to show that the rent of this leased line is not an operating expense of the I. & St. L. R. R. Co. inevitably leads to absolute absurdity.

It is an operating expense, and is, therefore, entitled to preference in payment out of the proceeds of sale in preference to the mortgage bonds. It is an indebtedness, which, in many ways, as has been shown, added to the security of the bondholders, and by which their property was benefited. It is exactly like claims for labor and supplies. The use of this leased line did keep the line between Indianapolis and Terre Haute a "going concern." It is, therefore, a debt which has by the course of judicial decision always been held entitled to a preference.

From a statement found on page 34 of Mr. Burke's brief, the Court might be led to infer that the I. & St. L. R. R. Co. has paid the 30 per cent. of gross earnings collected and retained by it for the seven months from April 1 to October 26, 1878. The statement is as follows:

"It certainly was discharged when the lessee paid over to the petitioner the entire 30 per cent. of gross earnings, it clearly appearing that the 30 per cent. of gross earnings was a much larger sum than the aggregate of net earnings."

Not one dollar of the 30 per cent. of gross earnings of the leased line from April 1 to October 26, 1878, amounting to $164,052.82, has ever been paid. Appellant has never received a cent for the use of its property during that seven months. According to Mr. Burke's theory there is no possible ground upon which payment of this $164,052.82, with its interest, out of the fund in Court can be equitably denied.

If this appeal is denied, if the C., C., C. & I. Ry. Co. is permitted, as bondholder, to take all this fund in Court, it is certain that the St. L., A. & T. H. R. R. Co. will

never receive a cent of the amount due it from the I. & St. L. R. R. Co. This would result in punishing the innocent and rewarding the wrongdoer. The history of this case shows that the St. L., A. & T. H. R. R. Co. has acted in good faith and wholly within its charter powers. If wrong has been done, if bad faith and violation of pledges have been shown, the St. L., A. & T. H. R. R. Co. has not been shown to be the wrongdoer.

Can a Court of Equity say to this appellant, it is true you acted in good faith and within your legal powers; it is true the I. & St. L. R. R. Co. in its action exceeded its charter powers; it is true that the possession of your railroad and franchises was of great value to the I. & St. L. R. R. Co.; it is true that it owes you the amount fixed by the decree of July 26, 1882; it is true the C., C., C. & I. Ry Co. was largely instrumental in inducing you to enter into the contract and yield possession of your railroad; it is true that it gave you a written guaranty upon which you relied; it is true that it was chiefly instrumental in creating the I. & St. L. R. R. Co. for the express purpose of its becoming your lessee; it is true that it took the bonds of the I. & St. L. R. R. Co. upon which this foreclosure was made, at a ruinous discount, and has drawn large amounts of interest out of gross earnings earned by the continuous line, of which your road constituted over two-thirds; it is true it has received far more in bond interest and in improvements to the I. & St. L. R. R. than it ever advanced under its contract, but, notwithstanding all this, the Court will refuse to pay you anything, and will allow the C., C., C. & I. Ry. Co., as bondholder, to take all the remaining pro-

ceeds of sale? It seems hardly possible that a Court of equity will so hold.

We ask that the decree appealed from may be reversed with directions to the Circuit Court to enter a decree providing for the payment of appellant's claim out of the fund in Court in preference to the payment of the second and third mortgage bonds.

Respectfully submitted,

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BY JOHN M. BUTLER.

INDIANAPOLIS, IND., March 9, 1888.